THE HISTORY OF THE LAW OF ENGLAND

AS TO THE

EFFECTS OF MARRIAGE ON PROPERTY

AND ON

THE WIFE'S LEGAL CAPACITY.

BEING AN ESSAY WHICH OBTAINED THE YORKE PRIZE OF THE UNIVERSITY OF CAMBRIDGE.

By COURTNEY STANHOPE KENNY, LL.M.,

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1879.

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Intendas animum, nec dulcia carmina quæras;
Ornari res ipsa negat, contenta doceri.

MANILIUS.

LONDON: REEVES AND TURNER, CHANCERY LANE.

1879.

Tempore.	DOWER.	WIDOW'S THIRDS.	CURT
LATER SAXON KINGS.	Secured by marriage covenant; otherwise, ⅓ of lands he has at death.	Indefeasible.	Not all
GLANVIL.	Secured as before; otherwise, ⅓ of lands he has at marriage.	As before.	Allowed in
BRACTON.	Secured as before; otherwise, ⅓ of lands he has *during* marriage.	As before.	Allowed in *tances.*
FOURTEENTH & FIFTEENTH CENTURIES.	Marriage covenant superseded by "Reasonable Dower." Rise of Uses; which escape Dower.		
HEN. VIII.	Dower barred by Jointure.		"Cry" disp
ELIZABETH.	And by settlements on unborn children.		Barred by on unborn
STUART KINGS.	And in ordinary purchase deeds. No Dower of Trusts.	Defeasible except in York, Wales, London.	
WM. III. *to* GEO. II.		Defeasible everywhere.	Curtesy of T bished.
GEO. III.	Fearne perfects "Dower Uses."		
WM. IV.	Dower made defeasible by husband. Dower of Trusts allowed.		Attempt to tesy fails.
VICTORIA.			Curtesy of Estate est

ICAL CHART.

URTESY.	WIFE'S PERSONALTY.	SEPARATE ESTATE.	WIFE'S CAPACITY.
t allowed.	Probably administered by husband.	The morning-gift is such.	Recognised.
in *maritagia*.	Belongs to husband.	Unknown.	Denied.
in all *inheri-*	As before.	Unknown.	She and husband may convey by Fine;
			Or by Recovery;
lispensed with.			May bar Dower by Fine; May Lease by Deed.
y settlements orn children.		Equity permits Separate Estate.	
	Equity to settlement established.	Rapid development of Separate Estate. Pinmoney permitted.	
f Trusts esta-		Separate Estate creatable by *husband*.	
	Wife may sue for her Equity.	Restraint on Anticipation permitted.	Mansfield attempts to give capacity to separated wives.
to reform cur- ils.			Deed acknowledged replaces Fine and Recovery;
of Separate established.	Earnings and Intestate shares protected.	Alienability fully established. Liability for debts extended. Statutory Separate Estate created.	She may—. (1) convey reversionary personalty, by deed acknowledged (2) be judicially separated (3) sue for Statutory separate estate (4) be sued for prenuptial debts.

ANALYSIS OF CONTENTS.

PART I.—THE GENERAL DOCTRINES OF CONJUGAL UNION.—(*Pp.* 7—20.)

The unique character of the English rules, which merge the wife in the husband
Contrast of the Keltic rules;
And of the Saxon.
The primitive legal theory of marriage is that of *mund* or *manus*.
This passed
(*a*) In most parts of Europe
Into the theory of *Community of Conjugal Property;*
(*b*) In England
Probably into that theory, under later Saxons;
Into the theory of *Conjugal Unity*, under Anglo-Normans.
This Anglo-Norman theory
Incapable of consistent application even at Common Law;
Invaded
(1) By Chancery. (Elizabeth.)
(2) By Parliament. (Victoria, 1870.)
Modern common law still harsher than Anglo-Norman;
For it renders defeasible (1) The widow's Thirds,
(2) And her Dower.
The four European theories of Conjugal Property.
Probable future of the English Law on this subject.

PART II. — CONJUGAL PROPERTY.—RIGHTS ORIGINATED BY THE COMMON LAW.

I.—WIFE'S RIGHTS IN HUSBAND'S REALTY.—(*Pp.* 21—60.)

Created by the Saxon
(1) *Doarium;*
(2) Morning-gift.
(3) Intestacy law.
Norman Feudalism
(1) Perhaps abolishes the Intestate share;
(2) And certainly the Morning-gift;
(3) And limits Doarium to her life (*dos ad ostium ecclesiæ*).
Contrast of this sketch with that of Nathaniel Bacon, Wright, and Blackstone.
Dos ad ostium ecclesiæ universally in Anglo-Norman period.
Selden's theory that it was known only in the North of England.
The Cambridge and London MSS.
Blackstone's theory of the endowment "with all my worldly goods."

GLANVIL treats it as limited, in military lands
(1) To a maximum of ⅓ of present and future lands;
(2) To no minimum;
(3) If no share be specified, to ⅓ of present lands.
It is only for life;
And is defeasible by husband's alienation.
Its maximum perhaps raised by post nuptial gifts;
Which are soon prohibited.
MAGNA CHARTA
(1) Creates the widow's *Quarantine.*
(2) Extends even the implied *dos ad ost. eccl.* to future lands.
BRACTON treats it as
(1) Indefeasible by husband's alienations, whenever it is specific.
But in socage lands its maximum still
(1) Extends to ½;
(2) But only during widowhood.
LITTLETON treats
(1) The socage rule as assimilated to the military;
(2) All dower as indefeasible by husband's alienation;
(3) *Dos ad ost. eccl.* as
(*a*) Limited by no maximum;
(*b*) Not binding on wife;
And it therefore dies out.
USES are invented and Dower does not extend to them;
But are counterbalanced by Jointures.
STATUTE OF USES abolishes them;
But gives extended effect to Jointures.
Dower interfered with by
(1) Rise of Trusts;
(2) Limitations to prevent its arising;
(3) Satisfied terms.
THE DOWER ACT (1833)
(1) Extends dower to Trusts;
(2) Makes it defeasible,
(3) And postpones it to creditors.

II.—WIFE'S RIGHTS IN HUSBAND'S PERSONALTY.—(*Pp.* 61—69.)

Saxons treat personalty like realty for *Doarium* and for Intestacy;
and probably
(1) Fix widow's intestate share at ½ or ⅓;
(2) Restrict husband's right of bequest.
Henry I. attempts to give full power of bequest.
Dos ad ostium ecclesiæ of personalty
(1) Is defeasible by husband's alienation;
(2) But can enlarge wife's share.
But becomes unlawful, A. D. 1406.
Husband's power of bequest is
(1) Limited in Bracton's time,
Except in London;
(2) Unlimited after the Restoration,
Except in York, Wales, and London.
Wife has larger intestate share in York, Wales, and London
Until 1866.

III.—Husband's Rights in Wife's Realty.—(*Pp.* 70—84.)

Less absolute than in personalty; because all rights in realty were in feudal law less absolute.

(1) Marriage gives him estate for joint lives.

With statutory powers of leasing (1540, 1856, 1877).

Equity follows this rule,

Except

(1) As to separate estate;

(2) When he can not maintain her.

Married Women's Property Act (1870) gives wife the beneficial interest if the land be

(i.) Bought with earnings; or

(ii.) Inherited.

(2) Birth of Issue gives him estate for his own life.

This a legal anomaly.

Explanations offered by

(*a*) *The Mirror*,

(*b*) Nathaniel Bacon,

(*c*) Wright.

Suggestion that it sprang from the Maritagium.

Glanvil.

It is limited to Maritagia.

Bracton.

It extends to all wife's fees.

Obtains name of "Curtesy."

The child originally required

(i.) To cry

(ii.) Within four walls.

Equity refuses Curtesy of Uses;

But afterwards permits it of Trusts;

Even in separate estate.

1831. Proposals to amend the law of Curtesy.

IV.—Husband's Rights in Wife's Personalty.—(*Pp.* 85—93.)

At common law are

(1) Absolute over choses in possession,

Except Paraphernalia;

(2) But qualified over choses in action,

(3) And chattels real,

(4) And slightly qualified over Paraphernalia, *viz.*,

Apparel and bed, ("Henry I.");

And jewels, (Elizabeth);

Unless given by strangers, (Geo. II.).

Equity follows the law;

Except in cases of

(1) Separate estate,

(2) Equity to a settlement,

(3) Husband not maintaining wife.

Married Women's Property Act gives wife the beneficial interest if the personalty be

(i.) Her earnings; or,

(ii.) An intestate share; or,

(iii.) A gift of £200 or less.

V.—Rights of Wife's Creditors.—(*Pp.* 94—98.)

During coverture they may sue husband.
- i. For wife's pre-nuptial liabilities,
  - (*a*) Arising from tort.
    - Limited exception under Act of 1874.
  - (*b*) Arising from contract.
    - Absolute exception under Act of 1870.
    - Limited exception under Act of 1874.
- ii. For wife's post-nuptial liabilities
  - (*a*) Arising from tort.
  - (*b*) Arising from contract
    - (1) Made by his express authority.
    - (2) Made by his implied authority.
    - (3) Made in consequence of his misconduct.

Part III.—CONJUGAL PROPERTY.—RIGHTS ORIGINATED BY THE COURT OF CHANCERY.

I.—The Wife's Separate Estate.—(*Pp.* 98—115.)

The earlier Chancellors do not allow it.
Elizabeth: Allowed to separated wives.
James I.: To all wives.
Charles I.: Becomes common.
The Cambridge MS.
Charles II.: Allowed even against husband.
Anne: And even to be given by husband after marriage.
Geo. I.: Trustees declared unnecessary.
Geo. III.: Restraints on Anticipation are sanctioned by Lord Thurlow.
Victoria: And are permitted to be ambulatory.
The Use permitted to be ambulatory.
Powers of disposition.
- (1) Allowed in case of Personalty.
  - Limited by Lord Rosslyn.
  - But afterwards re-extended.
- (2) Allowed as to the life estate in Realty.
  - Extended by Lord Westbury to the inheritance.

Liability for Debts.
- For express charges;
- For implied charges (Thurlow);
- For all contracts intended to refer to it (Victoria).

Statutory Separate Estate created (1870).
Its semi-legal character.

II.—Pin Money.—(*Pp.* 116—117.)

III.—The Wife's Equity to a Settlement.—(*Pp.* 118—122.)

Created early in 17th century.
Commences as a check upon husband's suit.
In 1801, allowed to be asserted by wife's suit.
Minor developments.

PART IV.—MARRIAGE SETTLEMENTS.—(*Pp.* 123—127.)

Early marriage settlements are mainly dispositive.
e.g., Father-fee.
Morning-gift.
Dos ad ostium ecclesiæ.
Frankmarriage.
Modern marriage settlements are mainly restrictive.
Feoffments to settlor's own use (before Henry VIII.);
(1) To bar Dower,
(2) Or Curtesy.
Jointures;
Before Henry VIII., to replace barred dower
After Henry VIII., to bar dower.
Settlements on unborn children;
To bar dower,
And prevent alienation.
They assume a complicated form,
Which contains provisions for the wife;
And are favoured
(1) By Chancery,
(2) By the Legislature (1855).

PART V.—THE WIFE'S LEGAL CAPACITY.

I.—GENERAL VIEW.—(*Pp.* 128—129.)

II.—ALIENATION.—(*Pp.* 130—138.)

The Saxon wife has the capacity of alienation.
It survives the Conquest.
But soon dies out
Revived by introduction of Fines (Henry II.)
Their effect on wife's lands doubted by Glanvil;
But established before Bracton.
Their effect on her Dower doubted by Bracton;
But ultimately established (Henry VIII.).
And by introduction of Recoveries.
Equity also refuses to wives the capacity of alienation
Except as to separate estate.
Fines and Recoveries superseded (1833) by Deeds
(1) Acknowledged, and made with husband's concurrence; or
(2) Authorised by Common Pleas Division.
Efficacy of such Deeds extended beyond that of Fines and Recoveries by Malins' Act (1857).

III.—THE WIFE'S TESTAMENT.—(*Pp.* 139—145.)

French, Scottish, and Manx system of "*Community of conjugal property.*"
Conjecture that it prevailed in England until adoption of Anglo-Norman system.
Reasons for this conjecture.
(1) Wives' Wills.
(2) "Laws of Henry I."
(3) Anglo-Saxon settlements.
(4) Anglo-Norman conveyances.

Wife could make Will

(1) By licence, of one-third of husband's property (Bracton).
(2) By licence, of her devisable land.

And still can do so

(3) By licence, of her own pre-nuptial property (Henry VI.).
(4) Of separate estate in personalty (Chas. I.).
(5) Under a power (Chas. II.).
(6) As executrix.
(7) After Husband's civil death.
(8) After Judicial Separation, or Protection Order (Victoria).
(9) Of separate estate in realty (Victoria).

IV.—The Wife's Contracts.—(*Pp.* 146—149.)

The Common Law does not permit her to contract;

Except

(1) As a trader in London; or
(2) After husband's civil death; or
(3) After temporary legal separation.

Mansfield's attempt to add the exception of voluntary separation.

The M. W. P. Act (1870) adds the exceptions of

(4) Any separate employment;
(5) Insurance of her own or husband's life.

There is also the general exception

(6) After Judicial Separation or Protection Order.

V.—Crime.—(*Pp.*150—155.)

Wife regarded as fully liable for crime;

Except as to

(1) Conspiracy with husband;
(2) Theft from him;
(3) Harbouring him after felony;
(4) Taking minor part in his
Thefts,
Other minor felonies,
And misdemeanours.

Part VI.—The Anglo-Indian Law—(*Pp.* 156—160).

LOGICAL ANALYSIS.

MARRIAGE WILL AFFECT:—

A.—PROPERTY WHICH BELONGED BEFORE COVERTURE, TO
- I. HUSBAND.
  - 1. Real.
  - 2. Personal.
- II. WIFE.
  - 1. Real;
    - (a) Accrued by Intestacy.
    - (b) ,, otherwise.
  - 2. Personal.
- III. BOTH HUSBAND AND WIFE.

B.—PROPERTY WHICH IS SETTLED FOR THE EVENT OF COVERTURE, BY
- I. HUSBAND, WHEN AN
  - 1. Infant;
  - 2. Adult.
- II. WIFE, WHEN AN
  - 1. Infant;
  - 2. Adult.
- III. THIRD PARTIES.

C.—PROPERTY WHICH ACCRUES DURING COVERTURE, TO
- I. HUSBAND.
  - 1. Real.
  - 2. Personal.
- II. WIFE.
  - 1. Real;
    - (a) Accrued by Intestacy;
    - (b) ,, from Earnings;
    - (c) ,, otherwise.
  - 2. Personal;
    - (a) Accrued by Intestacy;
    - (b) ,, from Earnings;
    - (c) ,, by Deed or Will, up to £200.
    - (d) ,, otherwise.

D.—OBLIGATIONS OF
- I. HUSBAND.
- II. WIFE.
  - 1. Prenuptial; arising from
    - (a) Contract, in case of marriage
      - 1. Before Act of 1870;
      - 2. Under ,,
      - 3. Under Act of 1874.
    - (b) Tort, in case of marriage
      - 1. Before Act of 1874;
      - 2. Under Act of 1874.
  - 2. Postnuptial, arising from
    - (a) Contract;
    - (b) Tort.

E.—EXPECTANCIES OF SUCCESSION AT DEATH OF
- 1. HUSBAND.
  - (a) Intestate;
  - (b) Testate.
- 2. WIFE.
  - (a) Intestate;
  - (b) Testate.

The History of the Law of England

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PART I.

THE GENERAL DOCTRINES OF CONJUGAL UNION.

It is not only in geographical position that England is an island. The "silver streak" along her coasts is not a more conspicuous barrier, than the line of demarcation which separates her legal polity from that of all the rest of Europe. Her jurisprudence is not the jurisprudence of the Continental nations, for she turned away from those Roman fountains from which they have drunk so deeply. Yet neither is it the jurisprudence of her Scandinavian sisters, for the torrent of feudal innovation, which they stemmed so successfully, swept in its fiercest form over the institutions that had come to her from them.

Feudalism naturally assumed its most gigantic proportions in the nations upon whom it was imposed by foreign arms. The Crusader in the kingdom of Jerusalem, the Norman among his Saxon serfs, felt neither scruple nor fear in imposing seignorial exactions which he would never have ventured amongst vassals of his own speech and stock. England thus experienced a feudal law at once more oppressive and more universal than that of other nations. If in the nineteenth century she is "the Herculaneum of Feudalism," in the twelfth she was its Alsatia. Then, as now, not an inch of her soil was allodial. Then, as now, she clung to Primogeniture with a zeal that amazed all other

nations. Then, as now, her law of marriage stood at variance with the polity of every other country in the world. It rejected the concessions which the canonical as well as the Roman jurisprudence had made to the law of nature; for it refused to recognise any marriage that was not solemnised with official ecclesiastical sanction, or to permit the marriage of erring parents to legitimise the offspring of their passion. It rejected the individuality which not merely those mature Italian systems, but even the Keltic and Teutonic customs, had conceded to the wife; it would not brook even the community of property to which the provinces of Northern France had subjected her; it clothed the humblest husband with more than the authority of a feudal lord, and merged his wife's legal existence altogether in his own. "Eadem caro vir et uxor,"—or in the commoner and franker form, "Uxor non potest contradicere viro,"—is the very head and front of the English common law of wifehood.

This extreme doctrine, this attempt to realise in temporal practice the loftiest spiritual theory of marriage, was, as I have said, unknown in England until after the conquest by the Norman Duke. But this same doctrine which distinguishes England among the nations of Europe, distinguished Normandy amongst the provinces of old France. These two facts suffice to indicate the men who first taught the doctrine; but they give us no hint as to the side of the Channel on which it was first learned. Here, as in so many other details of Anglo-Norman history, we must, if we limit ourselves to direct external testimony, be content to know that from William to Cœur de Lion both countries, step by step, and side by side, were developing a similar law of Feudalism, and a similar administrative system; and must resign the hope of being able to trace the details of their mutual reaction, or assign to either realm its original contributions to the great result. In that age, Feudalism seemed to have passed into the blood of Europe. Every social relation, from that between the Pope and the Emperor, down to those between the knights in an Order, or the graduates in a University, was governed by Feudal

analogies. It is not surprising, therefore, that in such an age a theory of conjugal life should have gained ground in England, which seemed to reproduce at every fireside the bond of lord and vassal. The justification was at hand—"C'est l'homme qui se bat et qui conseille."

Let us contrast this Anglo-Norman doctrine with the position which had been conceded to the wife by the earlier systems that had had their day in our island. When in 1605 the English judges of James I. were brought face to face with the customs of the Irishry, they were dismayed to find that among those savage men the wives of the chieftains claimed, even during coverture, a separate estate in certain parts of the household wealth.* This claim was promptly disallowed by the judges as illegal; but it was only the survival of customs which had been familiar to their own law in its earlier development.

The ancient Welsh laws which represent the Keltic polity in a later stage of growth than it ever reached in Ireland, contain abundant evidence that the wife's rights had kept pace with the increasing national wealth. These codes treat her as do the social, but not the legal, codes of modern times; they make marriage release her from disabilities, instead of imposing new ones upon her. The unmarried Welshwoman cannot buy or sell. But the wife's power of alienation is attested by the elaborate lists of articles which married women, according to their various ranks in life, are not to alien. Moreover we find enumerated her three heads of separate estate: her *cowyll*, or maidenfee; her *gowyn*, the fine which she could exact from her husband if he proved unfaithful; and her *saraad*, the fine she exacted from him if he beat her causelessly. No *saraad* was incurred, we are told, if the beating was inflicted on her for aliening

* *Case of Gavelkind* (Davies 51). "Ou les femes des Irish Seigniors ou Chieftaines claimont de aver sole propertie en certaine portion de biens durant coverture, oue power de disposer tiels biens sans le assent de lour Barons, fuit resolve et declare per touts les Justices, que le propertie de tiels biens serroit adjudge destre en les Barons, et nemi en les femes covert, come la Common Ley est in tiel case." Yet women could not inherit, and had no dower.

one of the things which the law forbade her to alien.* Elsewhere we are told that she must appear in justice alone, and plead independently of her husband, when the suit relates to a theft or murder that she has committed, or to "the title to land that she has in her own right."† But the later Welsh laws show us that long before the imposition of English jurisprudence upon Wales, the wife's position was declining towards the level of her Anglo-Norman sisters.

In like manner the Anglo-Saxon wife, as we shall again have occasion to notice, was a perfectly free agent with regard to the bulk, if not the whole of her property.‡ In the Saxon documents which Kemble compiled, we find, as he says, cases where married women's lands are devised by them "even during the husband's life. These it appears were such lands as the husband had formally settled upon his wife, either as the price for which he bought her of her friends, or as the morgengifu, in other words the morning gift, which it was usual to present to her on the morning after consummation. How it may have been with the former is not very clear; but the latter endowment appears to have been strictly in the wife's power: in several wills the husband carefully points out the lands to which his wife has this claim, and in several cases, women appeal to it as their title to lands which they are desirous of alienating. . . it appears to have been fully her own, to dispose of at her own pleasure."§ The husband probably had powers of personal enjoyment and of administration over the rest of her property, and perhaps even over these settled estates. But without her consent he can alienate nothing.‖

This individuality of the wife in præ-feudal times stands in vivid contrast with the disabilities which we find imposed upon her in Glanvil's time,¶ and practically illustrated in

* *Venedotian Code.* Ancient Laws of Wales, pp. 44, 46. Cf. p. 253.

† *Dimetian Code.* Ibid. p. 226.

‡ Cf. Lingard, Anglo-Saxon Church, II. 8 *n.*

§ Kemble's *Codex Diplomaticus*, p. cx.

‖ Phillips' *Angelsächsisches Recht*, pp. 142-5; citing, from *Hist. Rames.* 85, a precedent of Canute's time.

¶ Glanvil. vi. 3. Cum mulier ipsa plene in potestate viri sui de jure sit, non est mirum si tam dos quam ipsa mulier, et ceteræ omnes res ipsius mulieris, plene intelliguntur esse in dispositione viri ipsius.

the earliest of our reported cases, at the very outset of the thirteenth century.* She had by that time sunk to be the mere puppet of her husband's will; and her personality, like her personalty, is merged in his. Four generations had sufficed to produce this utter revolution in the law of marriage. Meanwhile there had been nothing in the circumstances of the nation, even if we allow to the full for the exigencies of Feudal life, that can be regarded as a sufficient indigenous cause for a change so vast. It would seem inexplicable if we had not already noticed that the same divergence of matrimonial theory which separates the Saxon from the Norman period in English history, separated Normandy from all other provinces in French customary law. We must infer that the Normans had retained the ancient doctrine of the *Mund* in all its Scandinavian simplicity. That doctrine, common to all the Germanic races in their earliest national life, placed the person and property of the wife under the power of the husband. She was in his Hand (*mund*); a phrase whose similarity to the *manus* of early Rome is even more striking than the similarity of the doctrines they both symbolise. But except amongst the Northmen, some measure of individuality and of proprietorship came to be conceded to the wife in spite of the *Mund*.†

* 4 John. Northampton.—Assisa inter Ceciliam de Flore et Matildam uxorem Petri de Honiton de dimidia virgata terræ in Flore &c. Consideratum est quod *quia uxor alicujus vivente marito suo nil habet proprium nec emptionem potest facere propriis denariis* quod Petrus et Matilda habeant seisinam de terra illa sicut de illa quam Gerardus de Disell emit suis denariis cujus heres ipsa est." *Abbreviatio Placitorum*, p. 41.

15 John. Norfolk.—Comes Rogerus Bigod petit feodum dimidii militis in Langhale versus comitissam Gundr. sicut illud unde Hugo pater suus fuit saisitus die qua obiit ut de feodo et jure. Comitissa Gundr. venit et dicit quod habet terram illam sicut eam quam emit versus Herbertum filium Rollandi in curia Domini Regis; et inde protulit cirographum suum inter eos in curia Domini Regis in quo continetur quod ipsa emit terram illam de prædicto Herberto pro LX marcis argenti tempore prædicti Hugonis viri sui. Et comes Rogerus dicit quod ipsa per se nullum catallum habuit, nec habere potuit, dum vir ejus vixit, nec aliquam emptionem de aliqua terra facere potuit quæ stabilis ei foret; et inde ponit se supra considerationem curiæ. Consideratum est quod ipsa nullum habere potuit catellum pro se tempore viri sui quod non esset viri sui. Et ideo comes Rogerus Bigod habeat saisinam suam, &c. *Abbreviatio Placitorum*, p. 96.

† Cf. Laboulaye's *Recherches sur la condition des Femmes*, pp. 137 and 370, with Thrupp's *The Anglo-Saxon Home*, p. 72. The Anglo-Saxon law regards the

In England the successful efforts of the clergy in the cause of female education had helped to confer on the Saxon wife that freer conjugal condition which we have already described; for the intellectual progress of any class never fails to secure its social and legal advancement. In France, as in the rest of the Continent, the collision with Roman law had converted the *Mund* into a guardianship; rendering the wife an individual proprietor, and reducing the husband's power to a mere veto upon her dispositions. It had, in fact, laid the foundation of the system of "Community of conjugal property" which after the lapse of eight centuries still plays so vast a part in Continental law. That system must at first sight appear unintelligibly complex to eyes accustomed only to English usages; yet there are facts, hereafter to be noticed,* which have led me to the belief that at one time it was in force upon our own soil. Their community in the *enjoyment* of the conjugal property is still maintained in the English rule which makes it no crime for the wife to take the husband's goods against his will. But so far as the *ownership* of property is concerned, all community had vanished even in Glanvil's time. English law placed the husband in the attitude of Petruchio:—

> "I will be master of what is mine own.
> She is my goods, my chattels; she is my house,
> My household stuff, my field, my barn,
> My horse, my ox, my ass, my anything."

Yet, irresistibly as law usually acts upon morality, it is remarkable how little this branch of our jurisprudence succeeded in moulding popular feeling to its own spirit. Cicero had noticed in women an "infirmitas consilii," and Gaius a "levitas animi," that justified the severity of *Manus*. But Bracton, though writing under a legal system almost equally harsh towards wives, inverts the picture, and declares that 'Fœmina magis doli capax est quam masculus."† And in modern

wife, children, and slaves, as being in the *mund* of the Paterfamilias; *Lappenberg*, II. 357. I must here, once for all, express my obligations to M. Laboulaye's valuable work, as well as to the remarkable and elaborate monograph of M. Paul Gide, *Sur la condition privée de la Femme.* * *Infra*, p. 139.

† Fo. 86. "Women have much hair and little judgment," (*Laws of Menu*).

times, whilst both the legal and the social theories that prevail in England as to the wife's position, differ from those current in the rest of Europe, they differ in opposite directions. Even in the Stuart period, the same judges who insisted that no other system of law gave the husband rights so extensive as did the English, went on to add that the inhabitants of England "ont gain deign commendations in tout forrein kingdoms pur lour respect a cel sex, quel le clime ad afford cy mult excelling en beauty devant ceux del autur paises, come cel pais afford a eux countenance devant auter pais."* And at the present day, whilst English law still treats the wife more harshly than does either the dotal system, or the community system, of Continental nations, it is in England rather than upon the Continent that the wife has won her place as the guardian angel of the household. Nor is the difference of recent origin. Lesage would as little have drawn an Amelia Booth, as Dumas a Laura Pendennis. On the other hand, we may regretfully confess that in the countries whose institutions have been more deeply affected than ours by Roman jurisprudence, the tie of parent and child is stronger and more lasting, the word 'Family' has a more extended meaning, and woman regains there, in the heightened reverence with which the mother is regarded, all that she loses in the lessened dignity that attaches to the wife.

When the fusion of the races had produced the modern English nation, we find, as I have said, its general doctrine of conjugal union expressed by the Father of its Common Law in the emphatic words that "Man and wife are the same flesh."† The sacred phrase had perhaps been suggested to the Archdeacon-Justice by his professional repetitions of the Church's language to congregations assembled "ad conjungendum duo corpora ut amodo sint una caro, et duæ animæ."‡ Bracton's sentence was a fiction; and like all other legal fictions, was incapable of consistent application.

* *Manby v. Scott* (1 Sid. 114); cited below Part II., ch. v.

† Bracton. Fo. 32. Sunt idem corpus et eadem caro, vir et uxor. Fo. 430. Sunt quasi unica persona, quia caro una et sanguis unus.

‡ Order of Espousals in the Sarum Manual. The York Manual speaks of the "commixtio corporum per quam efficiuntur una caro vir et mulier."

The remaining chapters of this Essay will serve to show within what narrow limits the doctrine thus broadly stated, a doctrine so often cited as a complete summary of English matrimonial law, has been actually carried out by our jurisprudence.*

The Common Law itself never applied the theory with any consistency, except in its rules of contracts, of torts, and of moveable property. In the law of realty, and in the law of crimes, only a very limited merger of the wife's individuality was found to be practicable. And much as the law gives the husband out of her wealth, it will not allow her to give him more and consummate its own professed principle of Unity of Property.† Again, Chancery, whilst at first following the common law in this direction so far as it had gone, began before the end of the sixteenth century to break away from the theory of unity. The equitable institution of Separate Estate, which first appears under Elizabeth, spread with remarkable rapidity among the wealthier classes; and speedily gave birth to a further innovation only second to it in importance, the wife's "Equity to a Settlement." Two generations sufficed to give a firm foundation to these inroads upon the doctrine of conjugal unity. Every succeeding reign has seen Chancery carrying its concessions into fuller and fuller consequences; so as to take from the Anglo-Norman theory all its absolute character, and render it a mere presumption which private dispositions and contracts may freely set aside.

Yet, whilst the Court of Chancery was thus releasing married women from the harshness of the old common law, a converse process was going on elsewhere which makes the wife in modern times stand before the common-law courts in a worse position than that in which the Anglo-Norman jurists had left her. All the rights of succession which they gave her upon the decease of her husband, had fallen under his control. In the eighteenth century he could bequeath

* "It is a well established maxim of the law that husband and wife are one person. For many purposes this is a mere figure of speech; for other purposes it must be understood in its literal sense." (Mr. Justice Lush, in *Phillips v. Barnett*, L. R., 1 Q. B. D., 440.)

† Infra, p. 128.

away her Thirds of his personalty; in the nineteenth he acquired the power of devising away the Dower she might have claimed out of his realty.

The English law of conjugal property would have been found intolerable in modern society, had it not been that the upper and middle classes upon whom its reform depended habitually evaded its rigour by contracting themselves out of it. Every marriage settlement was a protest against the law; but every marriage settlement was a guarantee for the continuance of the law. The wealthy classes insisted upon a settlement at the marriage of every daughter, and the Court of Chancery exacted one at the marriages of all its wards. In this way, every rich wife reversed the policy of the common law, secured to herself her own property, and secured pinmoney and jointure out of the property of her husband. The harshness of the law was experienced only by those classes who had no power to make or unmake laws. When they obtained political influence, a reaction set in.

The protection which had been conceded to women by Equity in one female reign, was in another confirmed to them by the legislature itself. In 1856, Sir Erskine Perry moved resolutions in the House of Commons upon this subject; and (with Lord Houghton) brought in a Bill the year after. Some similar efforts were subsequently made by Mr. Russell Gurney and others. In 1870, a year second only to 1833 for its importance in the history of law reform, these attempts culminated in the "Married Women's Property Act" (33 & 34 Vic. c. 93).

The Bill of 1870, as originally brought in, and as it passed the Commons, proposed to utterly abolish the theory of conjugal unity of property, and to let the wife retain after marriage the same legal rights that she enjoyed before it. The chief clause ran:—

> "A married woman shall be capable of holding, acquiring, alienating, devising, and bequeathing, real and personal estate, of contracting, and of suing and being sued, as if she were a feme sole."

But under the guidance of Lord Cairns, the Peers so amended the Bill as to render it practically a new measure; and it is in this modified form that it now stands upon the

statute-book. It bears the mark of its origin in the complicated and limited character of the rules that it introduces, with their differences and their qualifications, their distinctions between intestacies and gifts, between gifts and earnings, between earnings acquired before 1870 and earnings acquired after, between women who married before that year and women who married after it; (differences to which a further addition has been made by the Amendment Act of 1874). Yet whilst it presents as much opportunity for the censures of the scientific jurist as does the Toleration Act itself, the practical statesman will rank it by the side of that great enactment, as a memorable addition to the happiness of mankind.

The Married Women's Property Act conferred a prospective benefit upon all future wives of the wealthier classes by securing against their husbands all property that might accrue to them by intestate succession. But its salient clause was one which secured to all existing, as well as to all future wives, whatever property they might henceforward earn by skill of hand or brain; thus releasing from the Anglo-Norman doctrine the eight hundred thousand married work-women of England, and making the law itself afford to the mangle, the teapot, and the sewing machine the same protection which diamonds and consols had always purchased for themselves in the teeth of the law.*

It does not, however, abandon the old theory of conjugal unity and make the wife a full legal proprietor, but merely

* "I know," said Mr. Mundella, in the debate upon this Bill, "scores of cases in which the earnings of poor women are taken out of their hands by their husbands on the Saturday evening, and spent in drink." (*Hansard*, cci. 891.) In Finch's *Reports*, a seventeenth century wife piteously narrates, "that she put out several sums at interest which she acquired by her own industry, being a midwife, and bought and sold as a feme sole merchant; and that she had not any maintenance from her said husband for above eighteen years, but that she maintained both him and herself and four children during all that time, and had raised and paid her daughters' portions of £400 apiece and had paid £200 debts which her husband owed, and discharged him out of prison. And all this out of her own money. And continued to maintain her husband, till lately he broke open her chest, and took away her plate and money and securities for money." He finally conveyed away the whole of her property!

extends to these new cases the old principle of separate ownership in equity; either treating the husband as trustee, or, in some special choses in action, dispensing with a formal trustee altogether. In the case of shares, stocks, Government annuities and deposits, the Friendly Society, the company or the nation may deal with her directly.*

The English law of conjugal property thus stands, at the present day, an unscientific mass of rules, exceptions, and exceptions to exceptions; whose objectless confusion bears all the marks of a state of compromise and a period of transition. That it can long remain in its present condition is admitted on all hands to be impossible. But it is beyond both the province, and the powers, of the historian to predict the form into which it will settle down.

There are four systems into which, by a broad generalization from comparative jurisprudence, we may arrange the possible forms that the law of conjugal property may assume. Under the old patriarchal theory of *Manus* or *Mund*, common alike to both Roman and German in their patriarchal times, all the wife's rights were merged in the headship of the husband. From this, Rome leaped at a bound into the opposite theory of Paraphernality, under which marriage makes no change whatever in the property rights of the bride. Fatal experience led the Romans to retrace part of their advance, and adopt a Dotal system; under which a part at least of the bride's fortune, aided often by a contribution from the bridegroom, is set aside as a common conjugal fund, of which the temporary administration is entrusted to the man. The North-Western nations, however, when they outgrew their theory of *Mund*, did not advance so far as either a Paraphernal or even a Dotal system; but evolved, as we have seen, the less bold but more complex system of a General Community of conjugal property.

Modern civilisation will not brook the system of marital *Manus*; whilst it may be questioned if European society can afford to give to wives the same full individuality that is possessed by unmarried women. The two intermediate

* Secs. 2, 3, 4, 5, 6.

plans have been tried side by side in Northern and Southern France; and experience seems to have decided in favour of the system of community,* which appears, moreover, to have held its own in all other countries which have tried it.

The English law, as we have seen, consists of the theory of *Manus* (or, rather, of the closest approximation to that theory, that is now to be found in any civilised country), accompanied in Courts of Equity by the opposite extreme of a Paraphernal theory. From this position the United States of America have passed during the last thirty years into the full adoption of the Paraphernal doctrine of complete separation of conjugal property. Their brief experience seems to show that such a doctrine is not unsuited to the condition of Transatlantic society.†

The political forces now at work in England render it probable that our rules upon this subject will ultimately assume the same simple form as prevails now in Transatlantic jurisprudence. Yet it may be questioned how far

* It has now practically superseded the Dotal system, even in the South of France. "The community system appears to give complete satisfaction in France. Originally applied only to the bourgeois and peasantry, it was, on the revision of the Customs in the sixteenth century, extended to the nobles in Northern France. . . . Now, ninety-nine per cent. of the marriages of all classes are made *en communauté;* all those of the industrial classes without exception, and also nearly all of the middle classes." (Mr. H. R. Droop; *Transactions of Juridical Society*, iii. 632.)

† In Hansard (cxcii. 1375) the following evidence is quoted from Judge Washburn, once the Governor of a State, and now the Professor of Law in an American University—"It is now more than twenty-five years that the subject of independent ownership by married women has been a subject of consideration by our Courts and Legislatures; and the course of action has from time to time uniformly been in the direction of a more rather than a less independent right. . . . . I believe any attempt to go back to the Common Law would find little favour at this day. So far as my own observation extends, I have seen no mischievous consequences growing out of the change. It certainly makes wives more independent in the matter of property than Common Law did. But I have never known it to breed discord or discontent in families; it often saves a family from the consequences of the recklessness or misfortunes of the husband or father, by saving from the reach of the creditors the estate which belongs to the wife. Although I regarded the first inroad upon the Common Law, as to the rights of husbands in their wives' estates, with apprehension that it would cause angry and unkind feelings in families, and open the door for fraud, as far as the creditors were concerned, I am so far convinced to the contrary that I would not restore that Common Law if I could."

the habits of our society would permit the satisfactory working of such a system. It would be difficult to adjust English life to rules which did not place at least the furniture of the conjugal home, and the annual income of the wife's property, under the control of the husband. American experience is as yet too brief, and the surroundings too dissimilar, to afford us much guidance. The example of Rome is distinctly discouraging. However exaggerated the traditions may have been of the domestic fidelity which the institution of *Manus* nurtured, it is at least clear that it left behind it an enduring ideal of marriage, as the union of man and woman for lifelong partnership in all relations, human and divine,*—which contrasted bitterly with the conjugal life of an age when the opposite theory prevailed in law, and when popular feeling regarded the wife as merely existing (in the words of Ozanam) "plaire et propager." Even the acute and fearless mind of Bentham planned no change so sweeping

* *Columella.* (Bk. xii.) "Flagrabat mulier pulcherrima diligentiæ emulatione, studens negotia viri curâ suâ majora atque meliora reddere; *nihil conspiciebatur in domo dividuum, nihil quod aut maritus aut fœmina proprium esse juris sui diceret;* sed in commune conspirabatur ab utroque, ut cum forensibus negotiis matronalis sedulitas industriæ rationem parem faceret." *Modestinus.* (Dig. 23. 2. 1.) "Nuptiæ sunt conjunctio maris et fœminæ, et consortium omnis vitæ, divini et humani juris communicatio."

† Bentham thus formulates his doctrines:—"First condition.—*The wife should submit to the laws of her husband, saving recourse to justice.* Master of the wife as to what regards his own interests, he ought to be guardian of the wife as to what regards her interests. Between the wishes of two persons who pass their life together, there may at every moment be a contradiction. The benefit of peace renders it desirable that a pre-eminence should be established, which should prevent or terminate these contests. But why is the man to be the governor? Because he is the stronger. In his hands power sustains itself. Place the authority in the hands of the wife, every moment will be marked by revolt on the part of the husband. This is not the only reason: it is also probable that the husband, by the course of his life, possesses more experience, greater aptitude for business, greater powers of application. In these respects there are exceptions; but the question is, what ought to be the general law? I have said, 'saving recourse to justice'; for it is not proper to make the man a tyrant, and to reduce to a state of passive slavery the sex which, by its weakness and its gentleness, has the greatest need of protection. The interests of females have too often been neglected. At Rome, the laws of marriage were only the code of the strongest, and the shares were divided by the lion. But those who, from some vague notion of justice and of generosity, would bestow upon females an absolute equality, would only spread a dangerous snare for

as the American; but fully recognised that in every family there must be but one head, and that head must be the husband. It is surely within the reach of our legislative skill, to give a jural embodiment to these simple positions, without continuing to deny to married women all legal entity, or adopting the theory of Addison that "between man and wife, separate purses are as unnatural as separate beds."*

One thing, however, seems clear. The Anglo-Norman theory of conjugal unity will be utterly abandoned. It is tolerable only where it can find or make an identity of aims, feelings, and desires, such as can rarely exist even between wife and husband. But it is impossible to raise human life to an ideal level. Law will always hang in the rear of morals, as morals will always fail to keep pace with the progress of Religious insight. We must not hope, perhaps we need not desire, to see human jurisprudence realise St. Bernard's sublime vision of the wife and husband—

"Quibus omnia communia sunt; nil proprium, nil a se divisum habentibus. Una utriusque hæreditas, una domus, una mensa, unus torus, una etiam caro."†

them. To set them free, as much as it is possible for the laws to do, from the necessity of pleasing their husbands, would be in a moral point of view, to weaken them instead of strengthening their empire. The man, secure of his prerogative, has no uneasiness, arising from his self-love, and derives enjoyment even from sacrificing it. Substitute for this relation a rivalry of powers, the pride of the strongest would be continually wounded, and would prove a dangerous antagonist for the more feeble; and placing a greater value upon what was taken, than upon what was still possessed, it would direct all its efforts to the re-establishment of its pre-eminence." "Second condition.—*The administration should belong to the man alone.* This is a natural and immediate consequence of his empire. Besides, it is commonly by his labour that the property is acquired." "Third Condition.—*The right of enjoyment should be in common.* This condition is admitted; (1) For the benefit of equality; (2) In order to give to both parties the same degree of interest in the domestic prosperity. But this right is necessarily modified by the fundamental law, which subjects the wife to the authority of the husband. The diversity of conditions, and the nature of property, would require many details." (*Principles of the Civil Code;* Works. i. 355-6.)

* In that ablest defence of the Common Law theory, the 295th. *Spectator.*

† Sermones in Cantica, vii.

PART II.

CONJUGAL PROPERTY.—RIGHTS ORIGINATED BY THE COMMON LAW.

CHAPTER I.

WIFE'S RIGHTS IN HUSBAND'S REALTY.

Of the primitive institutions of the Germanic tribes no other showed such tenacity of life as the *Doarium*, their principal marriage-gift. It arrested the attention of Tacitus, who remarked with surprise that amongst the Germans "Dotem non uxor marito, sed uxori maritus offert." For the *doarium* given by the husband to the wife was a step towards the overthrow of the ancient doctrine of Hand. But the Roman *dos* which the wife placed under the administration of the husband, was, on the other hand, intended as a safeguard against that utter separation of conjugal interests which the overthrow of this ancient doctrine had produced.

Unhappily the mediæval translators and scribes adopted the old Latin name of *Dos* for the German institution; and thus laid the foundation of innumerable historical and legal ambiguities, by some of which even modern readers are still apt to be perplexed.* A similar, but slighter, confusion was produced by English lawyers in extending the term 'Dower,' which originally meant only this settlement created by the parties, to include the right which the law itself came ultimately to confer upon the wife.†

* Güterbock (p. 135) cites a Papal decretal, addressed, however, to Scotland, and referring to the Scotch *terce*, where the word *dos* is employed in the British sense, and not as "quod uxor dat viro." It is the decretal c. 6. x. de don. inter viv. 4-20.

† Latham, in his edition of Johnson's Dictionary, gives three meanings for the word *Dower*. (1) It is used by Cowley in the original sense of the *Doarium* given by the husband to or for the bride; (2) by modern lawyers, only in the sense of the estate which the law gives to widows; (3) by Dryden and Pope, in the sense of the portion brought by the bride to the husband. The word *Dowry* is used only in this last sense.

The *Doarium* we may with some probability regard as a form which the primæval Bride Price had assumed under the softening influences of civilisation;* and into which it at last was wholly merged by the pressure of Christianity.† But these two were not the only dispositions of property which in the ninth or tenth century the marriage of a wealthy Anglo-Saxon would have involved.‡ At the time of the espousal he must promise his wife's guardians the Bride Price, or Foster-lean, which repaid the family for the expenses of her nurture, and transferred to him the *mund* that they had hitherto exercised over her; (though, if a prudent lover, he will defer the actual payment until the subsequent nuptials before the masspriest, for the father of an attractive girl was apt to espouse her three or four deep, if he could find eager suitors with the Bride Price ready in hand). The guardians in their turn will announce what Fatherfee the wife will have. The Doarium must next be agreed upon; whether it be paid over, or only guaranteed to her, and whether it be a present settlement, or only a contingent provision for the event of her surviving him. Then he would probably recommend his suit by presenting her with some appropriate, though less valuable, Betrothal-gifts. The ecclesiastical marriage would then ensue.

But a fifth disposition of property was still to be effected. For the earlier Anglo-Saxon law did not treat even the masspriest's benediction as a conclusive union. Experience had still to show if the pair were apt partners for each other. If, on the morning following his nuptials, the husband rose with the determination to repudiate his bride, custom permitted the repudiation. If, on the other hand, he bestowed upon her the Maiden-fee in token of his approval, the marriage became binding, and she might rise and braid her hair in matron fashion. This *pretium*

* Grimm, *Deutsche Rechts Alterthümer*, p. 423; and Laboulaye, p. 84, who says this view is taken by Eichorn and Gaupp, whilst Heineccius thought the Bride Price and the Doarium quite distinct.

† See the Laws of Cnut, c. 74.

‡ Cf. Lappenberg, I. 338, with Thrupp (*Anglo-Saxon Home*) p. 47.

virginitatis, which we have already noticed amongst Welsh institutions, had in earlier days been recognised by the customs both of Greece and of Rome.* In the shape of the Germanic "Morning-gift" (*morgengifu, morgengabe*) it fastened itself upon Europe with such tenacity that even in our own day it is not wholly obsolete on the Continent.

In England, as elsewhere, it developed from a spontaneous gift into a regular matter of prenuptial contract; till ultimately even its precise amount was usually ascertained before the marriage—and not merely, as Gibbon hints, "by maidens too sure of not deserving it."†

When the Morning-gift had reached this stage, it was scarcely to be distinguished from the Doarium.‡ It had ceased to be limited to moveables, and had even become fully as valuable as the Doarium; and now the final test, that of date, was almost obliterated. All distinction was soon forgotten; and the Morning-gift became merged in the Doarium, which had already swallowed up the Bride-Price. The complexity of Anglo-Saxon settlements was gone; and only the *Dos ad ostium ecclesiæ* of our Common Law remained in the place of the husband's three great gifts.

* There is no Latin synonym for the Διαπαρθένια; and the Corpus Juris, I believe, is silent on these gifts; but Laboulaye notices a reference to them in Juvenal (vi. 203)—

"Nec illud
Quod prima pro nocte datur; quum lance beata
Dacicus et scripto radiat Germanicus auro."

It has been suggested that perhaps these gifts, and the payments which Herodotus (I. 199) describes the women of Babylon and of Cyprus as receiving, may have some common root in archaic ideas. In either case it is but once in a lifetime that the reward is earned. A widow who marries again receives no morning gift; (except, indeed, according to Laboulaye, in Altorf, and even then the gift receives a different name, and is called Evening-gift (*abendgabe*), in discourteous allusion to the bride's waning charms.) "Au coucher ensemble gaigne femme son douaire." *Grand Cout.* c. 101.

† *Decline and Fall*, c. xxxi.

‡ Hence some writers, like Barrington, and even Phillips, deny that the Morning-gift was known in England; whilst Laboulaye (p. 125) thinks that with the Anglo-Saxons and the Lombards it took the place of the Doarium. But it is mentioned in innumerable private documents, in the laws of Ethelred and of Canute, and twice in those attributed to Henry I. A trace of it seems to linger in Coke's rule that though a girl may marry at *seven*, yet she cannot have Dower if her husband dies before she reaches *nine* since below the latter age "non potest dotem promereri neque virum sustinere." (Co. Litt. 33a; Bracton 92). Cf. Laboulaye, pp. 132, 133.

I have thought it necessary to deal thus fully with these Settlements; because for a long time it was by them alone that the Saxon wife secured any interest in her husband's lands. At his death she fell back under the *mund* of her own family; and therefore archaic law would probably make no provision for her out of the wealth he had left. Even in the era of written law, we at first find no such provision made for her, if she be childless;* and although if she has children, a half of the deceased husband's property is conceded to her, it was intended rather for their advantage than for hers.

But our outline of the provision that Saxon law gave to the widow out of her husband's estate must be drawn, with a hesitating hand, from authorities meagre in themselves, and variously interpreted by commentators. The earliest hint derivable is from the Laws of Ethelbert (A.D. 550-616), the first Christian King of Kent; who, whilst silent as to childless widows, enacts thus:—

"If she bear a live child, let her have half the property if the husband die first."†

A century afterwards the Laws of Ine (King of Wessex, 688—725) enact, (cap. 57) that "If a ceorl steal a *ceap* and bear it into his dwelling, and it be attached therein; then shall he be guilty for his part, without his wife, for she must obey her lord. If she dare to declare by oath that she tasted not of the stolen property, *let her take her third part.*" Here she is not required to have children.

This provision is, as we shall hereafter see, remarkable as the first hint of a rule of criminal law that has lasted from Ine's day to our own, but now stands condemned by the proposed Criminal Code of the present Government (sec. 22). It corresponds also very closely with a clause (the 27th) of the "Laws of William I.," which similarly protects a wife's

* Thrupp, p. 68.

† Law 78, Thorpe's translation. Yet the very next clauses of Ethelbert's code provide for a divorcée who has no child to support:—"If she wish to go away with her children, let her have half the property; if the husband wish to have them, let her portion be as one child" (Laws 79, 80). This provision resembles an ancient Bavarian Law (xiv. 6), which gave the *widow* only a son's share (and only during her widowhood).

rights from being affected by any forfeiture for her husband's crime. Its value for our present purpose lies in its disclosure that as early as the seventh century the customary share of an English widow in her deceased husband's estate had come to be fixed at *one-third*. Whether the share would be affected by her being childless, we need not here stop to discuss. But I venture to conjecture that it was not a share of the husband's whole estate. The analogy of the later Anglo-Saxon and the Barbarian codes, as well as that principle of 'least resistance' which holds as true in legal as in mechanical pressure, will warrant the inference that it was only a share of the *collaboratio*, the acquisitions, moveable and immoveable, which had been made jointly by her husband and herself since the time of marriage. Saxon law, like Roman, and, in fact, like all other systems that give the wife an individuality independent of the husband, must at an early date have found it necessary to make some rule for the partition of these common gains. And it is easy to understand why her proportion was reckoned at one-third, and his at two-thirds, when we remember the old Scandinavian rule of inheritance which regarded a woman as entitled to only half the share that a male heir would receive.

A century and a half later, we find this law of 'Dower' modified by the introduction of 'Jointures,' (if we may borrow the phraseology of a later age and a different code). Edmund, in the middle of the tenth century, (940—946) gives power to the bridegroom to secure to the bride, as the *doarium* of betrothal, a still larger provision for the event of her widowhood than her customary thirds. Then, as in Bracton's time, these acts of amatory generosity were kept within narrow limits by the law in its jealousy of the rights of the bridegroom's children and kinsfolk; a jealousy which in the case of a second marriage, or of a marriage with a concubine, was eminently justifiable; especially as the gift was not usually limited, as it is in modern settlements, to the lifetime of the bride.

Edmund, whose favour towards these settlements may readily be traced to the ecclesiastical influence under which

his laws were avowedly framed, sanctions them in the following words:—

"If a man desire to betroth a maiden or a woman, and it so be agreeable to her and her friends, then is it right that the bridegroom, according to the law of God and according to the customs of the world, first promise and give security to those who are her *foresprecas* that he desire her in such wise that he will keep her according to God's law as a husband shall his wife; and let his friends guarantee that." [Then follows a clause requiring security to be given for the Bride Price.] "Then after that let the bridegroom declare what he will grant her in case she choose his will;* and what he will grant her if she live longer than he. *If it be so agreed*† then is it right that she be entitled to half the property, and to all if they have children in common, except she again choose a husband. Let him confirm all that which he has promised with a security; and let his friends guarantee that." [After this settlement the betrothal is to follow; and subsequently the actual nuptials before the "massprieast."]

This additional liberality to the wife who has offspring reminds us that these jointures were intended, as Bracton three hundred years afterwards declares, "for the support of the widow *and the education of the orphans*."‡ In the law of simple Intestacy, childlessness naturally had the opposite effect of increasing the widow's share, by removing the only competitors whose claim was as urgent as her own.

It is important to inquire whether these Saxon provisions gave the widow an absolute ownership, like that given by the modern law of personalty; or gave her only a mere life-

* This, I think, merely means "if she consent to marry him." So in Earl Godwine's marriage settlement (A.D. 1020, Thorpe's *Diplomatarium* p. 312) he first agrees to give her "one pound weight of gold in consideration that she will receive his suit," before going on to make the permanent settlement upon her. But it may mean that he is to declare what morning-gift shall reward her complaisance; as is conjectured by Lingard (*Anglo-Saxon Church*, II., 7), who finds in the words a resemblance to the vassal's oath of fealty.

† I copy from the best and most recent translation—that made for the Record Commissioners by Mr. Thorpe. Wilkins (A.D. 1721) similarly renders these all-important words, "Si hoc ita pacto conventum est." But Lambard (A.D. 1644) made them refer to the chance of survivorship, and translated them "*Si quidem eveniat.*" Lambard thus misled Nathaniel Bacon (*English Government*, pp. 104, 146), into supposing that the one-half was to be given "if *no* provision was made before marriage;" and further, that it was a half of the *goods* only, whence Bacon conjectured that the dower of lands was introduced by the Normans, and was meant to be a substitute for this Saxon share of personalty. See also p. 36 *infra*.

‡ Fo. 92.

estate, like that given both by the modern law of realty and the modern customs of settlement. The morning-gift was, as we have already seen,* the wife's absolutely; and would even go to her own kindred, rather than her husband, if she died without issue. Her intestate share of the deceased husband's estate I (for reasons that will appear in the sequel†) believe also to have been her absolute property. But both as to it, and as to the covenanted *doarium*, the inquiry is one that cannot be answered offhand. As Kemble says, "We learn from the codes of the Anglo-Saxon kings only certain salient points of the polity of our forefathers, and generally speaking such points only as mark an innovation upon the old and established order. In attempting to form an accurate conception of the Anglo-Saxon law in its manifold bearings, we are compelled to resort to other evidence than is supplied by the written law itself."‡ Materials for such an attempt may be found in the collection of wills and settlements translated in Thorpe's *Diplomatarium*. Yet as these are usually the dispositions made by benefactors of religious houses, they are scarcely to be regarded as trustworthy evidence of the ordinary family provisions of the time; and the frequency with which they give land to the testator's widow "for her day," and to a convent after her death, is no proof that a mere life-estate was commonly regarded as the natural provision for a widow. If a man had resolved that the reversion in some of his lands should be given to a convent, he would naturally fix upon those lands which he was giving to his relict; for she, of course, had less need of an estate of inheritance than his younger and more marriageable devisees would have.

But even in the Diplomatarium we have instances of widows to whom their husbands give land not merely for life but in absolute ownership.§ Thus Earl Godwine's settlement (A.D. 1020) gives his wife lands which will be

* *Supra*, p. 10. Cf. Ethelbert's 81st Law. † *Infra*, p. 32.

‡ Preface to Codex Diplomaticus, p. i.

§ P. 526, A.D. 970; p. 573, A.D. 1045; p. 597.

hers absolutely if she survive him;* and that of Wulfric (A.D. 1023), whilst giving his wife some lands for her life, gives her others for three generations, and others again in absolute ownership "to give and to sell to whom to her might be most desirable, for her day and after her day, where to her might be most desirable."† Again in 1045‡ a testator gives "to my wife Ailgith all the things which I have in Norfolk as I ere gave it her as *mund* and on our wedding-day;" and the context shows she will hold it absolutely. Another in 1050 devises to his wife "her portion for ever uncontested, to give and to have where to her may be most desirable."

In the eleventh century, however, a limitation was imposed upon the widow's property of every kind, including her *Doarium*, her intestate share, her Morning-gift, her Fatherfee, and even her old præ-nuptial possessions. Ethelbert had already imposed the injunction, "Let every widow continue a twelvemonth husbandless; then let her choose what she herself will." But Canute (1016—1035) on reiterating it, added definite penalties:—"If within the space of a year she choose a husband, then let her forfeit her morning-gift, and all the possessions (*æhte*) which she had through the first husband; and let the nearest kinsmen take the land and the possessions (*æhte*) which she had before. . . And let not a widow take the veil too precipitately."§ (This year of widowhood must be carefully distinguished from that lifelong widowhood which we shall subsequently have to speak of,‖ but which was never enforced by penalties so stringent).

The Laws of Canute¶ show also that wives still held separate estate; for the 54th Law makes the adultress forfeit nose and ears; and hands over to her husband "all her possessions" (*æhte*). Again, they direct that an intestate's property shall, after payment of the heriot to the lord,

* Thorpe's *Diplomatarium*, p. 312. † P. 320. ‡ P. 573 and p. 580.

§ Ethelred, Law 26; Cnut, Law 74 (71 in Wilkins); 'Laws of Henry I.' xi. 13.

‖ *Infra*, p. 33.

¶ Law 71 in Thorpe's edition; Law 68 in Lambard and in Wilkins.

"be distributed very justly to the wife and children and relations; to every one according to the degree that belongs to him;" thus recognising the widow as possessing a right in the succession; though they give us no information as to the extent of her right. In the absence of pure Saxon authority, we may accept as probable evidence of the Saxon law, the usages of the gavelkind folk. The Custumal of Kent directs that of their *goods* (*i.e.*, personalty) "if there be lawful issue in life," the widow shall have one-third; and if there be no such issue, she shall have one-half. Of these rules (which Bracton recognises as the common law of the realm) the former is only a repetition of Ine's rule; and the latter may well be equally ancient, although that king makes no special allusion to the case of a widow who is childless. It is curious that the corresponding passage, already mentioned by us, in the "Laws of William I." also makes no distinction between the cases where the criminal leaves or does not leave children; but apparently the writer unlike Ine, had in his mind the latter alternative, for the share he allots the widow is a half, not a third.

Another of the "Laws" attributed to the Conqueror bears directly upon our subject, but presents a still stranger omission. It declares the law of intestate succession, without making any provision for the widow at all; the sons are simply to divide the father's property—personal as well as real, according to Selden's interpretation*—amongst themselves:—

"Si quis paterfamilias casu aliquo sine testamento obierit, pueri inter se hæreditatem paternam equaliter dividant." (Cap. xxxiv.)

Singular as this omission is, we need not suppose that the writer intended to represent the widow as excluded from all share of her husband's wealth. We may regard it, not as an exhaustive statement of the law of intestacy, but as the earnest protest of a lover of Saxon customs against that "insolent prerogative" of Primogeniture which the Norman oppressors had begun to force upon his countrymen. Modern commentators on ancient laws, anxious to wring from their

* Uxor Ebr. II. 27.

scanty texts the uttermost farthing of information, and accustomed to the minute accuracy of parliamentary draftsmanship, are apt to scan the unpractised statutes of early times too microscopically, and draw conclusions too confidently from the silence, as well as from the language, of their framers. Yet we must confess that the strict interpretation of the clause, as giving the widow no share of the deceased husband's realty, is corroborated by a passage in Domesday. The Oxford inquest report a custom by which a murderer's wealth is forfeited to the king, but his widow's dower is saved to her "*si dotatam habuerit;*" apparently implying that unless the husband had expressly endowed her, she had no claim upon his land—in other words that the common-law right to a "reasonable dower" was the creation of a later age, and that Feudalism in England, as on the Continent, had abolished the widow's intestate share of *land.*

Between the landing of William, and the legal reforms of Henry II., there intervened a century of confusion in which an ever-changing medley of Saxon traditions and Norman innovations took the place of law. Of the rights of widows during this period we may gain some idea even from the so-called "Laws of Henry I.," a compilation whose doubtful date and doubtful character do not impair its value as a picture of an age of juridical chaos. One law, however, of indubitable genuineness it copies from Henry's Charter of 1100; providing both for the widows of the tenants in chief and for those of their vassals, in the following manner:—

"If on the death of a baron or other man of mine . . . his wife survive him and have no children, she shall have her dower and her *maritatio,** and I will not give her in marriage against her will. . . . And if his wife survive him and have children, she shall certainly have her dower and her *maritatio* provided she preserve her chastity; and I will not give her in marriage against her will; and of the land and children the guardian shall either be herself or any kinsman who may have a

* The dower and the maritatio are of course the lands given her by her husband and her father respectively. It is needless to dwell upon Nathaniel Bacon's theory that the former is the third of the husband's lands and the latter the third of his goods, and that the former is of Norman, the latter of Saxon origin. Compare "Edward the Confessor's Laws," c. xix.

better claim. And I bid that my barons deal in like manner with . . the wives of their vassals."*

With this we may compare the picture which is subsequently given of a more primitive law, surviving probably amongst women of humbler rank. The custom of Wessex is thus stated by the same writer:—

"If a wife survive her husband, let her have for ever the dower and the *maritatio*, that by deeds of gift or attestations was given her, and her morning-gift, and the third part of all the produce of their joint labour; besides her apparel and her bed.† And if anything have been spent thereout on alms or on the needs of the household, of it let her take no share."

"If a woman die childless, let her kinsfolk with her husband share her part."‡

(The word 'Dower' (*dos*) which occurs in both these passages presents an ambiguity which we must bear in mind. It may mean only the Saxon *doarium*, the jointure which had been expressly agreed upon at the betrothal; and in the Wessex law, if not in the Charter, this is the more probable meaning. On the other hand, it may already have acquired the wide sense, which it bore in Glanvil's time, and apply to any provision which the widow received from her husband's lands, whether by express agreement or by operation of law. With either meaning, however, the practical result would have been almost or entirely the

* Stubbs' *Select Charters*, Part III. (2nd ed. p. 100). Also, "Laws of Henry I.,"—I. 3. "Si mortuo barone sive alio homine meo. . . uxor ejus remanserit et sine liberis fuerit, dotem suam et maritationem habebit, et eam non dabo marito nisi secundum velle suum. 4. Si vero uxor cum liberis remanserit, dotem quidem et maritationem habebit, dum corpus suum legitime servaverit; et eam non dabo nisi secundum velle suum. Et terræ et liberorum custos erit sive uxor sive alius propinquorum qui justius esse debebit. Et præcipio quod barones mei similiter se contineant erga . . . uxores hominum suorum."

† I cannot concur in Mr. Thrupp's rendering, "*except his* clothes and *his* bed" (*A. S. Home*, p. 69).

‡ "Laws of Henry I.," LXX. 22. "Si sponsa virum suum supervixerit, dotem et maritacionem suam cartarum instrumentis vel testium exhibitionibus ei traditam, perpetualiter habeat, et morgangivam suam et tertiam partem de omni collaboracione sua, præter vestes et lectum suum. Et si quid ex eis in elemosinis vel communi necessitate consumpserit nihil inde recipiat. 23. Si mulier absque liberis moriatur, parentes ejus cum marito suo partem suam dividant." See pp. 64, 87, 142, *infra*.

same; for rarely, if ever, would a landowner's marriage fail to be accompanied by an agreement for a jointure. The English Church, as we shall hereafter see, sedulously adopted the principle of the Council of Arles, "*Nullum conjugium sine dote.*" Such a jointure, however small, would prevent the widow from claiming any further lands under the law of Succession, even if we suppose that Anglo-Norman feudalism did admit her to succeed to lands. Perhaps it was because in our island ecclesiastical care had thus kept the question of her admission from being mooted and negatived in practice, that English Feudalism, if it did ever exclude the widow in theory, certainly admitted her to the succession long before Continental Feudalism consented to do.)

Comparing these passages, we may notice that the second of them not only retains the Morning-gift, which the first omits, but also gives the widow her dower (like the rest of her property) "perpetualiter;" whilst the dowager of a king's vassal is to retain hers only during chastity (at any rate if she has children), and therefore we may presume that, in any case, she will only have an estate for life. This is the first indication we obtain of the inroads of feudal policy upon the old Saxon law of marriage. We know that in the ultimate settlement of English feudal law the widow's third of the lands was given for her life only, whilst her third of the goods was her own for ever. On the other hand we know that it would not be in harmony with the spirit of Saxon law to draw any such distinction between personalty and realty; and that the custom of other Teutonic nations permitted the widow to hold her dower in perpetuity even when it consisted of land.* The natural inference is that the "Dower" of modern English law, the mere life estate, does not represent the full provision of realty that our earliest law made for the widow, but has shrunk and dwindled from its primitive form. This inference the "Laws of Henry I." confirm, as we have seen; and show that even

*See Gilbert Stuart's "View of Society in Europe," ed. 1792, p. 222; and the law of the Visigoths, there cited, *introducing* restrictions on the widow's power to alien the dower beyond her life; also p. 418. And see Gide, p. 375.

in the twelfth century there was a time at which the full Saxon right had not become obsolete; whilst the feudal policy, working (as it always did) downwards from the king's great tenants, was already superseding it by the narrower provision which would interfere less with the heir's usefulness to his lord. On the Continent, where that policy was fully established, it had excluded widows from all provision whatever out of the land; and was to keep them so excluded for a century yet to come.*

The Charter, it will be seen, requires the widow who has children to remain chaste or forfeit the provisions made for her. This the commentators seem unanimously to regard as prohibiting her from even marrying. Edmund, two hundred years before, had similarly forbidden her to marry again, under penalty of losing her *doarium*.† Public feeling must have accorded with the principle; for a like prohibition was often attached by Saxon testators to the devises which they made to their widows.‡ Even in Bracton's time we shall find it attached by law to the dower of all socage lands.¶ The dislike which the Catholic Church has immemorially manifested towards second marriages must have tended to strengthen both the feeling and the law. Thus we are brought to the historical origin of those local rules which still, in all gavelkind lands and in many copy-

* Till Frederick II.'s constitution, cited by Blackstone, in the time of our Henry III., the rule of the Feudists was that "Quamvis enim possessio per beneficium ad eum pertineat, tamen propietas ad alium spectat; et ideo quartæ sive tertæ ratione, quæ a Longobardis seu a Romanis viris uxoribus fieri solet, post mortem viri ad mulierem nihil pertinet." *Consuet. Feud.* 2. 8. 2.

† The uncertain punctuation of Edmund's law prevents our saying positively if the prohibition extended to *childless* widows (as Kemble seems to have considered it to do). Certainly no such prohibition is expressed in that clause of the Charter which relates to them. But, as I have said, too much stress must never be laid on the mere omissions of early draftsmen; and we must beware of hastily assuming, with Gunderman and others, that chastity was not required from a widow who had no children. The Wessex writer omits all mention of such prohibitions; but can we assume that they were not in force there?

‡ See instances in Thorpe's *Diplomatarium*, p. 469, A.D. 835; p. 480, A.D. 871; p. 526, A.D. 970. The limitation is usually imposed by the words "mid clænnisse;" which Prof. Skeat regards as implying the full Catholic idea of purity, and excluding even marriage, a sense for which he refers to many passages in Ælfric's *Homilies* (I. 148, 546, &c.). ¶ *Infra*, p. 50.

hold manors, make the widow's rights dependent upon her chastity and her widowhood; and even to that of the general rule by which the Common Law itself, forgetting its jealousy of restraints upon marriage, permits settlors to impose them upon widows.

When the struggle of the races was over at last, when the exigencies of Feudalism had prevailed over the memory of King Edward's customs, when the great judicial system of Henry the Second had consolidated a jurisprudence and ushered in the era of modern English law, a victory had been won over the rights of women as over those of every other defenceless class. The law of Dower, as we find it in Glanvil's great treatise (1187—1189), the earliest institute of our existing law, has doubly limited the Saxon rules. The utmost share of his land that the husband can lawfully promise the bride at the church door is one-third, instead of Edmund's half or whole; and it is only for her life that she is to retain her share. But the former of these limitations (though Glanvil does not say so), must be understood as imposed upon military lands only. Bracton shows that in socage lands the husband was still allowed to promise, and the law in case of his silence would confer, one-half of his land; a rule still preserved in gavelkind lands, and in many copyhold manors. (The interest of the copyholder's widow still retains the name which Bracton gives to that of the socager's widow, and is not called 'Dower' but 'Freebench'). Again in the ancient Saxon boroughs where the youngest son inherits as sole heir (probably from the small size of the burghers' holdings which made them too scanty to deserve partition), the widow to this day receives for life as her Freebench, the whole of the land.* This Borough-English rule we may regard as the result of one branch of Edmund's law, whilst another has survived in the Kentish rule. The clauses which with him were interdependent and alternative, have separated into two distinct systems of succession.

* In the manor of Taunton Dene, in Somersetshire, the widow takes the Borough-English lands not for life only, but in fee, as the husband's sole heir, even when there are issue living; 1 M. & C. 420. This seems to corroborate the view that the Saxon widow's provision was her own in perpetuity.

It must also be noted that the gavelkind socagers long preserved a further trace of the Saxon laws of widowhood, which they do not now retain. The Saxon widow's intestate share was calculated upon the property which her husband had when he died (as in our modern law of personalty). But the share which Anglo-Norman law gave the knight's widow when her husband had promised her no specific proportion, was calculated upon the land that he had when he married her. Now the *Custumal of Kent* (A.D. 1293) gives the widow dower in gavelkind lands according to the former rule; "la meite des tenementz dont son baron mourust vestu e seisi;" a rule still observed in most copyholds.*

I have now given a sketch of the law of widows' rights, from the earliest extant Saxon rule to the establishment, five hundred years later, of a rule almost identical with that of the present day. For this sketch it may at least be claimed that it reproduces, and accords with, the whole of the original authorities upon the subject, and that the development it traces is normal and continuous. It is right, though superfluous, to add that this sketch is at variance with the view which is stated in the received modern text-books. That view, I believe, may be traced back to the mistranslations of one of our early antiquaries.

No loyal student of the laws of England will venture a hostile criticism upon Blackstone, without a reverent regret. He knows the charm of style, the novel breadth of view, of the jurist who "found the law a skeleton, and clothed it with life, colour, and complexion." But there is no ingratitude in confessing that the century which has elapsed since Blackstone wrote, has superseded by fuller light the historical stores, as well as the philosophical theories, that were the only materials available in his day.

Blackstone's account of Dower is (*a*) that the Saxons until long after Edmund's time gave the widow her *thirds*

* Since the decision in *Davis v. Selby* (Cro. Eliz. 825) dower has, on the other hand, been allowed out of gavelkind lands which the husband has aliened during the coverture. But Mr. Robinson's arguments (*On Gavelkind*, p. 222) for supposing this decision to be in harmony with the practice of Kent in the thirteenth century, will convince no one who is familiar with the language of Glanvil and Bracton.

of personalty, but no share whatever of the land; (*b*) that later Saxon law, probably under Danish influence, came to concede her a terminable life estate in *half* the husband's land; which (*c*) Norman jurists modified into Glanvil's rule. The view which I have endeavoured to make clear, is on the other hand, that (*a*) Saxon law, as far back as any trace exists, gave her a third of both real and personal estate, and gave it absolutely; that (*b*) Edmund allowed this absolute share to be enlarged by express contract to a half; and that (*c*) Norman jurists by removing this power of enlargement, and limiting to a mere life estate the period during which her thirds of realty could be retained, produced Glanvil's rule. The truth is that Blackstone borrowed his theory and his authorities, in the main, from Sir Martin Wright; who, in his turn, had borrowed them from Nathaniel Bacon; who had overlooked one authority, and had been misled by Lambard's mistranslation of another. For Bacon, not noticing the passage I have cited from Ine's law, supposes the earliest rule about widows to be the law of Edmund, and then doubly misunderstands this latter law.*

He takes it from the only translation then accessible, that of Lambard in the *Archaionomia* (Cambridge, 1644), who by the mistranslation which I have already pointed out,† makes the clause seem to be, not a definition of the utmost point to which express stipulation could enlarge the widow's legal share, but a definition of that share itself, the share which she would take, as Bacon says, "if no provision was made before marriage." Wright copied Bacon, without noticing that Wilkins (whose book he elsewhere cites) had corrected the mistranslation; and it is curious that Blackstone, whilst in his turn copying Wright, refers his readers for this very law to Wilkins, a glance at whose book would have sufficed to explode the error! The whole drift and scope of the rule have thus been permanently misrepresented.

Bacon's second error is his own, rather than his trans-

* Wright's *Tenures*, p. 191. N. Bacon's *English Government*, pp. 104, 146.

† See note on p. 26.

lator's. The "dimidia pars omnium bonorum,"* which according to Lambard's version of Edmund's law the widow was to have, Bacon interprets in the narrower sense that "bona" may bear, and supposes it to be a share of *moveables* only; an interpretation followed by Wright and Blackstone. (I need hardly remark upon this that the distinction between realty and personalty was unknown to the Saxons; and that by their jurisprudence "the whole property of a man was described by the same general term, and was subject to the same succession ab intestato"†). From this interpretation, taken in connection with his previous mistake that this clause is a Law of Intestacy, Bacon infers that the Saxons excluded a widow from any right to her husband's realty; and concludes, in consequence, that it must have been the Normans who first charged the heir with the burden of her Dower. These conclusions, at variance with all we know of both Norman and Saxon policy, Wright again copies. But here Blackstone breaks away. He had learned from Craig how inconsistent with the feudal policy of the Normans it would have been, thus to prefer a woman's interests to a swordsman's. He consequently suggests that as Canute's father instituted Dower in Denmark, the custom may have been imported into England by the Danes. To the historical basis of this suggestion there are, unhappily, two objections: the first, that the supposed Danish enactment to which Blackstone refers had no connection with Dower; and the second, that it never had any existence at all.‡

* Thorpe's "Half the *property*" (Thorpe's note here would mislead, if read apart from his text); Wilkins, "Dimidiam bonorum partem." The Saxon words are "*Healfes yrfes wyrthe*," "the worth of half the heritage." In wills of A.D. 829—955, I find *yrfe* evidently used as including land; and apparently as covering the whole *universitas juris* of a deceased, both land and "æhte." (See instances in Thorpe's *Diplomatarium*, pp. 462, 469, 471, 475, 483, 484-6, 499.) Prof. Skeat says that the various readings in Matt. xxi. 38, Luke xx. 14, show *yrfe* to be the same as the early Anglo-Saxon *erfe*; which is the same as the Gothic *arbi*, Icelandic *arfr*, German *erbe*, all meaning *inheritance*. Bosworth says that "According to Ihre and Adelung the original signification of *yrfe* was Earth. . . Then, the culture of the earth, and all that is acquired by it; any kind of property, landed property."

† Reeves I. 22. Finlason's edition.

‡ According to the "Modern Universal History" (xxxii. 91), to which alone Blackstone refers, the women of Denmark ransomed Sweyn from the Vandals

From this controversial digression, we may turn with relief to the later period of our history, where happily the authorities are more ample, and the commentators less numerous. Glanvil, as I have already said, gives us minute details of the law of Dower as it stood at the close of the twelfth century (1187—1189). His knowledge of Roman Law had taught him that the ancient Dos was the counterpart of the Englishwoman's *maritagium*, not of her Dower; and he accordingly warns us of the double meaning of the word. Glanvil's picture shows unmistakeable marks of feudal restriction. Under Henry II. as under Edmund, and as in every age of her history, the Church jealously guards the interests of widows; though with a less disinterested benevolence than in the days when Stephen assuaged the murmurings of the Grecians and the Hebrews. The ecclesiastical law still commands a settlement to be made either by the husband or his friends before marriage takes place; and the secular law, now largely influenced by clerical justices, confirms the injunction. The sedulous precaution of the Church is attested by the venerable *Use of Sarum*, which was compiled before the end of the eleventh century, and represents Anglo-Saxon offices of a still greater antiquity. Immediately after the solemn opening question concerning the possible impediments to a lawful marriage, the priest or bishop is directed to put a further question, touching the woman's dower: — "Interrogat sacerdos dotem mulieris." Or as a MS. of the fifteenth century* (for the mediæval liturgies abound in local variations) more fully puts it, "Let

by the sacrifice of their jewels; and he upon his return showed his gratitude by establishing "some laws favourable to women, and among others ordained that they should inherit a third of the estates real and personal." The story is derived from Saxo Grammaticus (Book x.); on reference to whom it appears that the alleged law was not a rule about Dower, or limited to wives; but was a general recognition of the female sex as competent to inherit. "Fœminis deinceps participandarum hæreditatum jus, a quibus ante lege repellebantur, indulsit" (ed. 1839, I. 494). From the modern editor's remarks (II. 300) it appears that the story of the ladies' patriotism may perhaps be credited, but that modern Scandinavian jurists are agreed "nullam legem de hæreditate fœminis vindicanda a Suenone unquam esse latam."

* Harleian MS. 2860. "Quærat si res suas bene disposuerunt; et dicatur dotale, si opus fuit."

him demand if they have made fitting disposition of their property, and let the writing of dower be read." Still more striking was the ceremonial in the Northern Province. For the *Use of York* postpones the demand of dower until after the solemn putting on of the ring. When the bridegroom has said, "With this ring I wed thee; and with this gold and silver I honour thee;* and with this gift I dowe thee"—the priest inquires the woman's dower. It is declared; and then comes the startling rubric, "If land be given her for her dower, let her fall at the feet of the man."† A third form of the endowment occurs in a twelfth century MS., preserved at Oxford, which directs it to take place after the joining of hands, but before the putting on of the ring, and bids the dower be given to the wife "per cultellum."

According to all these liturgies, (and universally throughout England until the prayer-book of 1549), the chief part of the service takes place at the entrance to the church; and it is not until a later stage than the putting on of the ring that they enter the church itself. Hence it was natural for this covenanted dower to be styled "dower *ad ostium ecclesiæ*," just as for Chaucer to say of the Wife of Bath that

"Husbands *at the church door* had she five."

I cannot pass in silence the strange theory of Selden that the church door dower was never in vogue where the Use of Sarum prevailed.‡ This startling conclusion he seems to build merely on a single word in the rubric of the edition he

* This gold and silver, the *arræ sponsales*, which connect our marriage with Roman law, are required by all the old English *Uses*. They were retained in Edward VI.'s first prayer-book (1549), which bids the man "give *unto the woman* a ring and other tokens of spousage, as gold or silver, laying the same upon a book." The framers of the second prayer-book (1552), with a quickened professional sense of the opportunities of the occasion, only bid him give her "a ring, laying the same upon the book, *with the accustomed duty to the priest and clerk*." They consequently omit the subsequent words, "This gold and silver I thee give;" which were retained in 1549. The practice of making these presents during the service must have survived, nevertheless, into the eighteenth century; for in 1722 we find a suit (*infra*, p. 102) about "dowry money," in which these old liturgies were quoted to show its nature.

† "Deinde sacerdos interroget dotem mulieris. Tunc si terra in dotem ei detur, procidat illa ad pedes viri." MS. in Cambridge University Library, numbered 1036; (fourteenth century). ‡ *Uxor Ebr.* p. 278.

followed, which directs the priest to inquire about "dotem mulieris *videlicet arras sponsales*;" from which Selden inferred that the South of England limited this dower to the mere "tokens of spousage." This theory of our greatest antiquarian jurist presents two anomalies—an unprecedentedly narrow sense for the word "dos," and a South-country law of Dower at which not one of our early jurists ever hints, though they all resided in southern counties. In hope of solving the difficulty, I have collated five MSS. of the Sarum Use.* I find that not one of them contains the three words on which Selden's theory is based. We are therefore, I think, fully justified, both by external and internal evidence, in rejecting this theory. It is needless to stop to inquire whether *videlicet* was a slip for *et*, or whether the whole *videlicet* clause was a copyist's gloss.

Mere reference to the printed liturgical collections now accessible to every reader,† shows how little ground there is for an ecclesiological theory which Blackstone has pieced together out of Selden, as to an expression in our present marriage service. Blackstone says: "When the husband endowed her with personalty only, he used to say, 'With all my worldly goods' (or, as the Salisbury ritual has it, 'With all my worldly chattel') 'I thee endow;' which entitled the wife to her thirds or *pars rationabilis* of his personal estate . . . though the retaining the expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which she acquires during coverture, out of her husband's personalty."‡ It is sufficient to remark (1) that these words occur in a distinct part of the Salisbury service from that in which the husband makes the legal endowment; (2) that they are prescribed by the Church as an universal formula, and not merely for marriages in which the covenanted dower was to be of personalty, still less for the still rarer marriages in which this personalty dower was

* In the British Museum, the Harleian MSS. numbered 873, 2860, and 2984. In the Cambridge University Library the MSS. numbered 2276 and 2337. All these are of the fifteenth century.

† See, for instance, vol. lxiii. of the publications of the Surtees Society.

‡ II. 134.

to consist of the whole of the personalty (Blackstone's words almost seem as if he fancied that it necessarily did so consist); (3) that there is no evidence that the wife's right to her pars rationabilis was ever dependent on the utterance of this clause, whilst in fact a third of the worldly chattels would have been but a lame and impotent conclusion to a promise to give them *all*; (4) that a wife's right to maintenance is in no way limited to "her husband's *personalty*."

The simple truth is that the clause, "With all my worldly catel I thee endow," has no legal effect, and was never intended to have any. The ancient Church secures a limited legal provision for the bride by its rubric for a church-door covenant, and then puts this clause into her bridegroom's mouth to show that her moral claims upon his wealth are not measured by her legal rights, but that in the ideal Christian household husband and wife, like the Christians of the ideal age, "are together, and have all things common."*

It is scarcely necessary to add that at the early date at which the formulas were composed from which the Sarum Use was compiled, *chattel* was a synonym of wealth, and had not yet been narrowed to the meaning of "moveables" only. Were Blackstone's theories true that the gift of "all my worldly goods" is meant as a gift of *legal* ownership, and is limited to personalty, the words should be placed in the mouth of the bride and not the bridegroom. She does give him the legal ownership of all her chattels. He gives her nothing, not the very wedding ring itself.

Blackstone's technical juridical explanation of this lofty poetic outburst of Christian ethics has acquired currency

* Acts ii. 44. The Ely Pontifical (marked "Ll. II. 10" among the Cambridge University MSS.), which is as early as the twelfth century, makes the reading of the instrument of dower immediately precede the man's putting the ring on the finger; and therefore naturally refers to it in the clause, which it frames thus, "De isto annulo . . . *et de ista dote te doto.*" It is possible that this is the original form in which the clause was introduced into the service. But as it was only in a small minority of marriages that there would be any such instrument to read, forms more universally applicable would generally supersede it. Several such forms are found, the most common being the "all my worldly cathel."

even in ecclesiastical textbooks; currency so universal that we can not wonder at Sir John Bowring's grotesque criticism—"*With this ring I thee wed* is Popery; *with my body I thee worship* is idolatry; and *with all my worldly goods I thee endow* is a lie!"

Resuming the purely legal aspect of our subject, it is important to notice that despite the studious care of the Church to make the bridegroom covenant for a Dower, no care was taken to make that covenant one of substantial value. A mere illusory gift would suffice for a Dower. (A similar omission may be remarked in the clause of the Statute of Uses which created Jointures; but here judiciary law has practically supplied the defect.) Care had, on the other hand, been taken to prevent the covenant from being of excessive value. For the law fixed, as in Edmund's time, a definite limit to the bridegroom's generosity; and feudal policy had narrowed the limit which Edmund set him. He may promise his bride *one-third* of all his freeholds, including those which may become his at any future time during the coverture, as well as those which are his on the marriage-day; but any further gift is void. If he either promises nothing, or promises her "a dower" but mentions no specific share of land or goods, then she will receive on her widowhood a third share of such lands as were his at the time of the wedding; but, unlike the Saxon widow, will neither have her share enlarged to a half in the event of childlessness, nor obtain any share of the lands that he may acquire after the marriage-day. In these changes we probably see an instance of that familiar juridical process by which a clause that is habitually inserted in contracts of any given kind, gradually comes to be associated with them as a tacit legal incident—a process strikingly illustrated in the recent development of the English law of Leases and of Warranties. Thus, in the case before us, when church-door covenants were prevalent amongst landowners, and usually extended only to those lands which were the husband's at marriage, it is not surprising that whenever the covenant had not defined the provision, the law should imply the form which it found most common; instead of borrowing the

obsolete Saxon rule of Intestacy, and charging the dower upon all lands which were the husband's when he died. I call that old rule obsolete; for the comparative universality of church-door covenants must have removed almost every occasion for its application to landed estates, even if we admit that early Feudalism would have allowed a widow to take lands in the absence of an express covenant for her doing so.

In the reduction of the widow's share to a third (a reduction which was at first confined to military tenants) the influences of Feudal policy appear; but they are still more evident in the mode by which this third is to be calculated. The heir is to take to himself the chief manor, or the chief messuage, if there be but one manor; and it is only the rest of the property that is to be apportioned into thirds. The widow becomes a mere tenant of her child's; and forfeits her dower to him if she dares to remarry without his consent.

But these were not the most serious of the inroads that Feudalism made upon the law of dower. The absolute ownership of the Saxon widow, inconvenient in a polity that needed warlike vassals, was cut down to the mere life estate that it still continues to be. It is generally assumed that this change had taken effect before Glanvil wrote; and the probabilities of history confirm the assumption. But I have failed to find any passage in his book which gives conclusive proof that the dowress of his day was no longer a tenant in fee-simple.*

* The strongest is the passage about advowsons, VI. 17. (Bracton, on the other hand, says expressly that dower "uxori remanet ad vitam" only.) The following is the pith of Glanvil's account of dower:—Book VI., chap. 1. "Dos duobus modis dicitur; dos enim dicitur vulgariter, id quod aliquis liber homo dat sponsæ suæ ad ostium ecclesiæ tempore desponsationis suæ. Tenetur autem unusquisque tam jure ecclesiastico quam jure seculari sponsam suam dotare tempore desponsationis. Cum quis autem sponsam suam dotat, aut nominat dotem aut non. Si non nominat, tertia pars totius tenementi liberi sui, intelligitur dos ejus; et appellatur 'rationabilis dos' cujuslibet mulieris tertia pars totius liberi tenementi viri sui quod habuit tempore desponsationis ita quod inde fuerit seisitus in dominico. Sivero dotem nominat, et plus tertia parte, dos ipsa in tanta quantitate stare non poterit; amensurabitur enim usque ad tertiam partem, quia minus tertia parte scilicet tenementi sui potest quis dare in dotem, plus autem non."

Chap. 2. "Contingit autem quandoque quod si modicum tenementi habeat is

It is important to notice that all these rights of the widow still retained traces of the vague character that they had borne in their original Saxon form. The Saxon widow's claim, even when confirmed by nuptial covenant, was merely for a proportion of that indefinite and indefinable total—the property which the husband might happen to possess when he came to die. Consequently it was always liable to be defeated by his alienating the property before his death. Feudalism, as we have seen, shifted the date at which the claim is to be estimated; and reckoned it as a share of the lands that were the husband's on the marriage-day. But it still continued to be a mere defeasible claim; and did not as yet rise into a right of property. If the husband of Henry II.'s time aliens any lands that are included in the dower, the purchaser obtains a title which overrides that of the widow. The heir, it is true, must find her an equivalent for the lands she has thus lost; the amount of her claim against him is not diminished by any alienation that her husband may make during the coverture. But it is only against the heir that she has a claim, not against the pur-

qui mulierem dotat tempore desponsationis suæ, possit dotem ampliare scilicet de questu suo in tertiam partem vel minus. Si vero de questu nihil fuerit expressum in dotis assignatione (licet parum habeat tenementi tempore desponsationis), et postea multa acquisierit, nonpoterit in dotem clamari plus tertia parte illius tenementi quod habuerit quis tempore desponsationis quo mulierem dotavit. Idem dico si quis in catallis et in rebus, terram non habens, vel etiam in denariis sponsam suam dotaverit, et postea magnum questum fecerit in terris et tenementis, nihil de cetero de questu in dotem clamare poterit; quia hoc generaliter verum est, quod quantacunque vel qualiscunque assignata fuerit dos alicui mulieri si inde satisfactum fuerit mulieri quantum ad ostium ecclesiæ assignatum fuit ad dotem nunquam de cetero poterit amplius ad dotem petere."

Chap. 3. "Sciendum autem est quod mulier nihil potest disponere circa dotem suam tempore vitæ mariti sui. Quia cum mulier ipsa plene in potestate viri sui de jure sit, non est mirum si tam dos quam ipsa mulier et ceteræ omnes res ipsius mulieris plene intelliguntur esse in dispositione viri ipsius. Potest autem quilibet uxorem habens, dotem uxoris suæ donare vel vendere vel alio quo voluerit modo alienare in vita sua; ita quod tenetur uxor sua in hoc sicut et in aliis rebus omnibus quæ contra Deum non sunt ei assentire. Adeo autem tenetur mulier obedire viro suo, quod si vir ejus dotem suam vendere voluerit, et ipsa contradixerit, si postea fuerit ita vendita dos et empta, mortuo viro suo non poterit mulier dotem ipsam versus emptorem petere, si confessa fuerit in curia vel super hoc convicta quod ea contradicente viro suo fuerit dos a viro suo vendita."

chaser of the land. If the husband has left no inheritance for the heir, her rights under the church-door covenant are gone.*

A contrary rule would have operated harshly towards purchasers. For if no written record had been made of the terms of the endowment—and the law does not seem to have required one to be made†—a buyer had no means of ascertaining that the land that was being conveyed to him had been included in the dower of the seller's wife. It is not unreasonable to regard this middle course of Glanvil's time, giving the widow a permanent *jus in personam*, but no *jus in rem*, as preferable not only to the later rule which fettered the specific land with her indefeasible dower, but also to the present modern system under which her husband's conveyance sweeps away her claims without the shadow of a reparation.

Glanvil gives no hint that gifts between husband and wife during coverture were forbidden by law. Güterbock‡ suggests that they may even have been of frequent occurrence at that time; for they would form a convenient mode of evading the restrictions which Feudalism had imposed upon the liberality of a husband's gifts at the church door. The judges, however, came to the protection of the heir, and declared all gifts that exceeded the legal amount of dower to be invalid, whether made after marriage, or even in view

* I am aware that according to Reeves (I. 156) "If notwithstanding a solemn declaration of her dissent and disapprobation, her dower was sold, ... upon proof of her dissent she *could* recover it." But in all manuscripts of Glanvil that Beames collated, the uniform reading of this passage (VI. 3) is "*non* poterit mulier;" which tallies with Houard's account of the older Norman custom, and with the drift of c. xiii. of this Sixth Book. See Beames' translation, p. 117 *n.*

† Even a century later these covenants were not always reduced to writing, for we find a trial of 1297 in which the dowress relies on oral evidence. "25 Edward I. Eboracum. Dotacio Aliciæ quæ fuit uxor Walteri Heyrun facta ad ostium ecclesiæ tempore solemniciacionis matrimonii inter eos per assensum patris dicti Walteri allocatur; quia patet per juratam et per testes quod talis fuit modus, talis fuit causa, et tale fuit factum." *Abbreviatio Placitorum*, p. 293.

‡ "Bracton and his relation to the Roman Law," ed. Philadelphia, pp. 110, 111. Cf. Madox, *Form. Anglic.* Diss. Sec. viii.

of marriage. Bracton cites a decision to this effect delivered in 1224, and followed by subsequent rulings in 1231 and 1233. This rapid succession of precedents, and the care of Bracton to cite them all, seems to indicate that the principle was a novel one to English people. The marks of foreign importation are indeed upon it; for Bracton's only reason for gifts of dower being excepted from the prohibition, is that they correspond to the Roman *donatio ante nuptias*, in favour of which the Imperial constitutions had made a similar exception, (for which he refers his readers to the Codex.)* Even in a later generation the rule prohibiting these gifts was still regarded as an imported one; for Fleta† accounts for it expressly on the ground that the Roman law had prohibited them.

Almost contemporaneously with these inroads of judiciary law upon the prospects of the wife, she acquired great advantages from parliamentary legislation. In 1215 the Barons had presented to John as one of their Articles, a demand that widows should receive their lands without payment to the lord; and should be permitted to remain in the husband's chief mansion for the first forty days of widowhood. This demand was conceded in the great charter of the same year, and in the subsequent charters. In that of 1217 the "widow's quarantine" is enhanced by a provision for her maintenance during the forty days; and a remarkable clause follows, defining her right of dower. This clause provides that the widow (unless by the church door covenant she has accepted a smaller provision) shall have assigned to her for her dower a third part of all the lands which were her husband's "in his lifetime;"‡ words which were not unnaturally interpreted to mean "at any time during the coverture." The Saxon law, as we have seen, had provided for the widow only out of what was the husband's when he died; the law of Glanvil's time (which

* Cod. 20, 5, 3. † III. 3. 12. Contrast *Abbrev. Plac.* p. 294.

‡ "Assignetur autem ei pro dote suâ, tertia pars totius terræ mariti sui quæ sua fuit in vitâ suâ, nisi de minori dotata fuerit ad ostium ecclesiæ." All the documents referred to here will be found in Stubbs' *Select Charters*, 2nd edition, pp. 290, 299, 341, 345, 353. On Quarantine, cf. Fleta, II. 57, 10.; F. N. B. 162.

was in force down to the passing of this statute) only out of what was his on the marriage day. Neither had dealt with her so liberally as this charter. (Yet I must confess a doubt whether the framers meant their words to be anything more than a definition of the existing rule. If they did desire to include the whole period of coverture, it was imprudent to use the yet wider word "lifetime," which properly would take in lands that the husband had aliened even before, as well as after the marriage day. The received interpretation has, however, been unanimously accepted since the beginning of the fourteenth century, if not from the date of the Charter itself.)*

All these provisions are repeated by the charter of 1225—the earliest of the Statutes of the Realm. Eleven years afterwards, Parliament, in the Statute of Merton, again made provisions for the protection of dowresses; but they are not of sufficient importance to require discussion here.

The picture which Bracton (1261—68) gives us of Dower is not only fuller than Glanvil's, as the ampler scope of his treatise would naturally render it, but shows traces of growing changes in the law. As the current of statutory enactment prepares us to expect, these changes are in the widow's favour. The period of pure military feudalism had passed away; the age of clerks and serjeants, quiddits and quillets, had set in.

It would be disrespectful, however, to the most laborious historian of our law if I were to pass in silence his assertion that one serious reaction had taken place to the widow's disadvantage. Mr. Reeves holds that in Bracton's time, "notwithstanding the provision of Magna Charta," the widow's "claim of dower was still limited" as in the days of Glanvil, "to the freehold of which the husband was seised at the time of the espousals."† Overwhelming evidence would be necessary to prove that the most solemn of the statutes of the realm, in full harmony with the spirit

* In Y.B. Mchas. 5 Edw. 2 it is said by counsel, and not disputed, that "I a grand Chartre veot que chescun eit dower de chose dont le baron avoit fee *puis les esposailles*." † I. 335. All difficulty disappears, if we suppose the "received interpretation" not to have been invented till after Bracton.

of the age, had been thus flagrantly and silently disregarded. But the only ground for Mr. Reeves' conjecture is Bracton's definition of Dower as the third part of the lands which the husband "held in demesne, and so in fee that he could have thence endowed his wife on the day of the espousals;"* a definition which presents no difficulty when we remember that in Bracton's time, as in Glanvil's time, the churchdoor covenant might always be made to include the husband's future acquisitions as well as his present possessions. Thus Fleta, whilst following Bracton's definition, afterwards explains that a widow suing for her reasonable dower obtains a third part of the land that belonged to the husband "on the day of the espousals *and afterwards*."†

On the question most interesting to conveyancers, the right of the wife against persons to whom the husband has sold his lands, Bracton shows that progress had been made towards her fuller protection. For wherever the husband had named at the churchdoor a definite piece of land as her dower, her claim became indefeasible; and at his death she could recover that specific land from the hands of any adverse holder. Where, however, the covenant had merely fixed the *proportion* she should have of his estates—or had left her to her legal proportion—her right was still a mere *jus in personam*, to recover an equivalent from the heir; but with this marked advance, since Glanvil's time, that if the heir had not assets enough to furnish this equivalent, she might then recover the alienated lands from the alienee, and retain them until at any future time a sufficiency of assets accrued to the heir.‡ The widow, moreover, is described by Bracton as entitled to claim her dower in preference to all creditors;§ (it will be remembered that the

* Bracton, Fo. 92. Tertia pars omnium terrarum et tenementorum quæ vir suus tenuit in dominico suo, et ita in feodo quod eam inde dotare poterit die quo eam desponsavit.

† Fleta, 340 and 344. Cf. Britton's ambiguous passages (V., 2, 3; V., 1, 4); the latter of which passages would be conclusive, if we could be sure that it referred only to "reasonable" dower, and not to dower covenanted expressly. Mr. Nichols' note on the former passage deserves study.

‡ Fos. 94 and 301.

§ Fo. 98. Cf. fo. 61 on the London custom. Fleta II. 57, 9.

exemption of land from liability to the owner's ordinary debts was not established until after this time.) Magna Charta* had guaranteed this preference of dower to debts. But it is unnecessary to suppose that because Glanvil makes no corresponding statement, there had been in this a change since his time; for the narrower scope of his book necessitated the omission of many well-settled rules, of which this may have been one. A similar remark applies to Bracton's fuller definition of the estate that admits of dower—it is not only to be the husband's own ("in dominico"), as Glanvil had said, but must be his "in fee;" a remark perhaps suggested to Bracton by the increasing prevalence of long leaseholds "which exceed the lives of men."†

The circuits of the itinerant judges had now, by a century of experience, brought home to the lawyers of the metropolis a vivid sense of the tenacity of local customs in various parts of the realm. Several such customs bearing on dower are mentioned by Bracton;‡ often the survivals of usages that had once been universal. (In the science of human law, as in that of physical life, the ancestral condition of modern forms is often best indicated to us by the evidence which Teratology furnishes.) Thus he shows us from several Nisi Prius rulings, that in the city of Lincoln if the husband has to sell his lands the wife's dower is extinguished by the conveyance; which in Glanvil's time had been the law throughout the realm. And moreover in the same city the dower share is still to be reckoned upon the lands which are the husband's, not at the wedding-day, but at his death; as had been the custom in Saxon times, and as it is to our own day in the majority of the copyhold manors that allow a freebench. But a survival more important, and far more widely spread than any of these, remains to be mentioned. It was, as we have said, by the Feudal military policy that the widow's share had been cut down to a third. We must now add that where the lands were not military, that rule had not been adopted even in Bracton's time. Quoting a case from the Cambridge assizes

* Art. 11, Stubbs' *Select Charters*, p. 291. † Fo. 27. ‡ Fo. 309.

of 1230, he tells us not only that the rule does not hold good even in military lands if there be a custom to the contrary; but even (little as the sweeping language of Glanvil and of his own earlier statements would have led us to suspect it) that it does not hold good in socage lands, nor in gavelkind.* Moreover the socmen's widows forfeited their dower ("Francum Bancum" he here calls it) if they married again. This limitation to widowhood is still imposed on the freebench in some copyhold manors; as the most grotesque of the *Spectators* has indelibly recorded.† In Kent, it need hardly be said, the gavelkind lands have preserved to our own day both these customs; the dower is still of a half, and it ceases upon remarriage. In military lands, as we have seen, the licence of the heir was necessary for the widow's remarriage; and here the analogy of Feudalism had probably worked in her favour, leading the courts to associate such licences with those ordinarily granted by the lord for a female vassal's marriage. In this way it may have come about that the limited character of the widow's interest was forgotten, and that she came to be regarded as tenant for life and not for widowhood.

In socage tenures, then, the law of Dower like the law of Descent, maintained a fairly successful resistance to the Feudal changes for more than two hundred years after the Conquest. The student of that period of English law must be on his guard against exaggerating the rapidity with which Saxon usage was superseded in the country at large. For the old lawyers have constantly in their minds those great military fiefs which supplied the chief occasions of litigation in the King's Court, where lawyers learned the law; but which were of all estates the first to be affected by the innovations of feudal policy. The vast majority of English owners, protecting their ancient rights in the cheap obscurity of the manor courts or the shiremotes might long escape those innovations, and yet be ignored in the generalisations of metropolitan jurists. Even in our own day the political student needs a similar caution; (though it is in the inferior, not the central courts, that the innova-

* Fos. 93, 95, 309. † No. 623.

tions now make their appearance.) For a solicitor in large provincial practice as an advocate could describe the law of evidence as administered in our County Courts, and the varied criminal enactments which bye-laws and private Acts of Parliament have established in our new municipalities, in terms that would upset the generalisations of the most learned leader of the bar. Yet it is on these petty local courts alone that the eyes of the vast majority of Englishmen are fixed with any personal interest.

Very soon after Bracton's time the church-door dower must have become comparatively rare; for the great statute *De Donis*, of 1285, prevented tenants in tail from conferring it upon their brides, whose right, however, to a "reasonable dower" remained unaffected.*

Two hundred years after Bracton we again obtain a picture of English real property law from the *Tenures* of Littleton. The principal changes that we observe in the law of dower are in the widow's favour. One is that the *dos ad ostium ecclesiæ* is no longer confined to a third of the husband's lands, present and future; but may extend to the whole of his estate.† Another is that it no longer conclusively ascertains the widow's rights; but may be waived by her at the husband's death, if she prefer to take instead the "reasonable dower" that the law would have awarded had there been no covenant.‡ A settlement so inconclusive was little better than useless; and it is not surprising that dower *ad ostium ecclesiæ* fell into complete disuse centuries before its abolition in 1833 (3 & 4 Wm. IV., c. 105, s. 13). But the most important point to be noticed in Littleton is that the husband has lost all power of affecting the widow's rights by alienating his lands.§ Even the mere unspecified, or uncovenanted, *i.e.*, "reasonable" dower, had become a *jus in rem*.

But a change of overwhelming extent was at hand. The system of Uses, the separation of the beneficial interest in land from the visible possession of it, sprang into prevalence

* Littleton, s. 46.
† Littleton, s. 39.
‡ Littleton, s. 41.
§ Littleton, s. 36.

during the Wars of the Roses, as the only means of securing the estates of the combatants from the hazard of being forfeited whenever the tide of success might happen to turn against their party. When a feoffment of lands was made to Uses it would indeed leave the feoffee's interest liable to seizure for forfeiture, for dower, for debts, and all the other inconvenient liabilities of the Common Law, (care doubtless being usually taken to select a feoffee whose character or circumstances would reduce these liabilities to a minimum). But the merely beneficial interest which the feoffor retained escaped them altogether. The Chancellors, in spite of the traditional favour of the ecclesiastical law to widows, established the principle that there was "no dower of a use." The feoffee must render the profits to no one but those who had been expressly named in the declaration of confidence. A similar strict construction of the words of donation excluded dower and curtesy from Continental feuds.* Hence, whenever a man conveyed lands of his own before marriage to his own use, or had any newly purchased lands so conveyed—and in the fifteenth and sixteenth centuries the great majority of English lands stood in this double ownership†—no interest in them, legal or even equitable, would accrue to his widow at his death, unless she had secured an endowment at the church door. It was but a slight set off to this that the same feoffment which excluded her hold upon the lands, had also rendered those lands devisable; and that the new power of devise thus acquired by the husband might perhaps be exercised in her favour.

Widows were the weakest of all the many classes whose interests were subverted by the system of Uses. The king and the feudal lords were also sufferers, and were strong enough to seek a remedy. In 1536 Henry VIII. procured the passing of the Statute of Uses, the keystone of modern conveyancing. Deploring "the utter subversion of the ancient common laws of the realm" by the employment of Uses, it aimed at them what seemed to be a fatal blow,

* *Infra*, p. 73. *Supra*, p. 33.

† Co. Litt., s. 464, speaking of even as early an epoch as A.D. 1415.

enacting that every man who thus obtained a beneficial interest in land. should, in addition, become the full legal owner, with all the duties and liabilities of possession—among which the liability to "reasonable dower" was perhaps the most generally important.

The framers of this statute were so clear-sighted as to foresee an unfair result which it would be apt to produce in the case of persons married before its enactment; and the clause which they drew up to obviate this result, produced effects upon conveyancing that have survived the generation for whose protection it was inserted. What they feared was this. Many men whose estates stood settled to Uses, and thereby released from all liability to dower, had compensated their wives for this deprivation by giving them "jointures;" *i.e.*, by settling some estate in such a manner (usually giving it to husband and wife jointly) that the wife, on becoming a widow, would acquire an estate for life in it. (Jointures are mentioned in the older statute about Uses in 1483; and Henry VIII.'s statute specifies six different forms in which settlements with this object were framed, since provisions for the husband or for the issue of the marriage might also be inserted.) Now a manifest injustice would be done if the Statute by destroying Uses restored these widows to their dower, and at the same time permitted them to retain the jointure which had been given them in lieu of that dower. A clause (sec. 4) was consequently inserted to provide that any widow who was thus provided for by a "jointer" before marriage, should not become entitled to dower out of her husband's lands; whilst (sec. 7) if jointured after marriage, she might elect between her dower and her jointure, but could not have both. This provision laid the foundation for a long series of judicial decisions defining the settlements which will be regarded at law, and the still more varied ones which will be regarded in equity, as constituting valid jointures effectively extinguishing the right to dower.

The church-door covenant after being long on the wane, at last died out. "Diu abhinc exolevit" says Selden.* It

* *Uxor. Ebr.* p. 278.

had for centuries ceased to be necessary as the very foundation of all claim to dower; and for the purpose of specifying the lands from which dower was to arise (and thereby enabling the widow to enter upon them without waiting for the heir's assignment) it was superseded by jointures with their livery of seisin, and usually with also their more permanent—if less notorious—memorial of title, a written charter of feoffment. (This disappearance of the ancient oral *dos ad ostium ecclesiæ* before the written dotalitium which had come into use as its mere subsidiary incident, may remind us of the Nuncupatio of the early Roman wills per æs et libram; which after coming to be recorded in *tabulæ testamenti*, then shrank to be a mere recognition of the tablets, and at last entirely gave place to them and fell into disuse.) It must not be forgotten that the jointure had the further advantages that, unlike later church-door dower, it was final, and left the widow no right to elect her common-law dower instead; and that, unlike all kinds of dower, it was not lost by the husband's being attainted of treason—no slight gain in the age of the Reformation.

It is unnecessary to describe here how the main object of the Statute of Uses was soon defeated by the judicial doctrine that "there cannot be a use upon a use." On this foundation a vast fabric of equitable interests was raised once more; under the appellation, indeed, of *Trusts*, but retaining almost all the properties of the ancient Use, and amongst them the property of not being chargeable with dower for the owner's widow. This important exemption, after having long been sanctioned by professional opinion based on the ruling about ancient Uses, seems to have been asserted by Chancery in 1626 and in 1664,* and was formally established in 1733 by Lord Chancellor Talbot. He was pressed with the argument that trusts had recently been held liable to the widower's analogous right of curtesy. But he decided against the widow; declaring that as before the Statute of Henry VIII. "an use was the same as a trust is now, it follows, that the wife can no more be endowed of a trust now, than, at common law and before the Statute, she could

* *Rempe v. Eresby* (Tothill, 160); *Colt v. Colt* (Ch. Rep., 254).

be endowed of an use. So that here is the opinion of the whole Parliament on the point; and it has been the common practice of conveyancers agreeably hereto, to place the legal estate in trustees on purpose to prevent dower; wherefore it would be of the most dangerous consequence to titles, and throw things into confusion, to let in the claim of Dower upon trust estates, contrary to former opinions and the advice of so many eminent and learned men. I take it to be settled that the husband shall be tenant by the curtesy of a Trust, though the wife can not have dower thereof; for which diversity, as I can see no reason, so neither should I have made it; but since it has prevailed, I will not alter it. There does not appear to be so much as one single case, where, (abstracting from all other circumstances) it has been determined there shall be dower of a Trust."* This decision is said to have, not unnaturally, "startled" the House of Lords when first quoted to them.† They were only restrained from overruling it, by the consideration of the purchases which had been made, both before and after it, in the faith that the vendor's wife could claim no dower of his equitable interest; purchases so numerous that it was of the utmost importance not to impeach or impair them.

Hence it became the settled rule that whenever lands were held by A "upon trust" for B, B's widow would have no dower out of them; and though A's widow would be entitled to hers, yet she would hold her estate as A had held his, merely as a trustee, and with no benefit to herself.

Trusts, it is true, were not so fatal to the interests of married women as Uses had been. The political causes which had rendered the employment of the latter almost universal, did not operate in the case of Trusts. Ever since the Statute of Uses, the great bulk of English lands have been in the actual possession of the beneficial owners.

The dowress thus seemed to be once again in comparative safety. But the prospect was deceptive. The rapid increase of commercial wealth rendered sales and resales of land so frequent that every owner desired to have his title in a marketable condition. No purchaser was willing to have

* *Chaplin v. Chaplin* (3 P. Wms. 229). † *Burgess v. Wheate* (1 W. Bl. 182.)

his new acquisitions hampered with a contingent claim which would diminish their value whenever he resold them. The wife's prospective right of dower was such a claim; and even if her husband could induce her to release it when he came to sell the lands, that release could not be legally given without the expensive formality of a fictitious suit. And though the lands might from the wedding day be kept clear of this right, by giving other lands to her as a jointure, this only shifted the burden without lessening its weight. Means must be found of excluding dower altogether.

Where a rule of law is so costly as to be worth evading, sufficient legal subtlety for its evasion can always be purchased. Conveyancers taxed their ingenuity, for generation after generation, in devising various means by which a man might buy lands and yet confer upon his widow no claim to them whatever; might deprive her, in fact, of her contingent "thirds" of the purchase money, without any compensatory chance of an interest in the estate purchased. The ultimate result of these efforts displayed an ingenuity not unworthy of Aquilius Gallus or of Sir Francis Moore. The "dower uses" may well rank beside the *formulæ doli mali*, the all-novating stipulation, and the Lease and Release, as enduring trophies of the craft of the chamber.

The first scheme that was contrived for framing a purchase deed so as to prevent any right from accruing to the purchaser's wife, was indeed but a fragile protection. The lands were conveyed not to the purchaser alone, but to himself and some friend of his as joint tenants; the friend's share being held only in trust for the purchaser. Here the wife could claim no dower out of the husband's legal estate in one moiety, because he was a mere joint tenant, and the right of survivorship is preferred even to dower; and as his other moiety was merely equitable, she was equally excluded there. The misfortune was that the friend might happen to die first, and in that case the purchaser became sole owner both at law and in equity, and his wife consequently became entitled to dower.

A security which was thus attended by an even chance of utter failure, offered no great attractions. Improvement was

in vain attempted by vesting (as Lord Talbot has reminded us), the whole legal inheritance in the trustee; for this, though ousting the wife with certainty, placed the family property for ever at the mercy of an outsider and his unknown heirs.

Ere long a mode of barring dower was invented, by which the widow's rights were destroyed through the aid of the very Statute that had recalled them into vogue; the engineer could not be hoist save with his own petard. By this plan the conveyance was made "To such uses as the purchaser shall appoint; and until appointment to the use of himself and his heirs." The power of appointment thus given to the purchaser enabled him at any time to dispose of the lands free of any claim on the part of his wife; whilst it left her claim unimpaired, if he died without having disposed of them. Yet it was possible that by some improbable contingencies (which to any reader familiar with the doctrine of Powers will readily suggest themselves), the power thus created might be extinguished, and the claim to dower thereby become indefeasible. Charles Butler (the Selden of the eighteenth century) contributed a safeguard against this peril by giving the land, in default of appointment, to a trustee during the purchaser's life, whilst reserving the legal remainder in fee to the purchaser. But this deprived the landowner of the full legal right to occupy his own land in his own life. By a masterstroke of ingenuity, a complication was added, which left the conveyance exposed to no drawback whatever. It was the invention of Charles Fearne, who made it public in 1791 in the fourth edition* of his famous "Essay on Contingent Remainders." The purchaser's inheritance was to be divided into three estates; each of which was too imperfect an ownership to confer dower; whilst the combined effect of the three was to render him, for all practical purposes, full owner of the land both at law and in equity. The seisin was delivered to the purchaser for his life, an estate which not being of inheritance was

* Fearne's *Contingent Remainders*, p. 347. The suggestion would hardly have been ventured had not the case of Duncomb v. Duncomb (3 Lev. 437) declared this extremely uncertain remainder to be not a contingent one.

not liable to dower; and a remainder in fee was also given to him, which not being in possession was not liable to dower; whilst the merger of these two interests was prevented by interposing between them a remainder to some third person as trustee, which, however, was no substantial impairment of the purchaser's ownership, since it was so limited as to arise only in the remote contingency of his undergoing "civil" death in his natural lifetime, continue only until his natural death, and meanwhile be held only for his benefit. The purchaser had full legal possession, full power of disposal, full beneficial enjoyment; and yet his lands were relieved from all liability to dower.

So effective an artifice came at once into general use; sometimes alone, more frequently as an addition to the older plan of a power of appointment. Until 1834 it continued to form a part of every well-drawn purchase deed; and it is still in use whenever a conveyance is made to a man who was married before that year—that is to say, in probably about five per cent. of the conveyances of the last twelve months.* Our admiration of this skilful contrivance must not blind us to the gross injustice it did to married women; unlike the previous scheme of a power of appointment, it did not merely prevent their right from being a fetter on the alienability of the land—it annihilated that right, and annihilated it without compensation.

The zeal of conveyancers against Dower, was, however, evidenced not merely by these efforts to prevent it from arising; these provisions against the dower of each new purchaser's wife. They were equally eager to defeat the right when it actually had arisen, and protect the purchaser from the claims of the vendor's wife. Their zeal made them attempt to effect that protection by means which the ordinary principles of equity would have rendered unavailing. The means were these. If in the title to the land purchased, any term of years could be found outstanding which had been created before her right to dower attached, then they assigned this term in trust for the purchaser, and

* About 4·5 per cent. of the population of England are over sixty-five years of age; *i.e.*, had attained majority when the Dower Act came into force.

insisted that his trustee's interest would protect him against the widow, though he had paid his purchase money with full notice of her right to dower. So inequitable an artifice would have been contemptuously quashed by the Court of Chancery if set up against any other incumbrancer; but unfortunately no dowress disputed the efficacy of these assignments until the practice of making them had become so universal that to insist upon their invalidity would have shaken innumerable titles.* The cases in which *Communis error fecit jus* are rare in our legal history; but it may be doubted whether other devices which have been successfully employed to defeat the right to dower had any better foundation than this unscientific maxim of prescription.† If so we have additional reason to marvel at the success with which from century to century conveyancers have foiled the repeated efforts made by bench and senate to protect the rights of married women.

The Real Property Act of 1845 (8 & 9 Vic. c. 112) contains a provision on this subject, under which all terms that thereafter become satisfied, come at once to an end. Little inconvenience is now occasioned to purchasers by this change, as few landowners, and therefore few vendors, still survive whose wives' dower is still regulated by the old common law, and not placed by a modern statute at the husband's mercy.

In 1833, a year which forms an epoch in almost every branch of Real Property law, were passed the "Act for the abolition of Fines and Recoveries," which enabled a wife to release her prospective claim to dower by a cheaper mode than that of a fictitious suit; and, far more important to our subject, the "Act to amend the law of Dower," (3 & 4 Wm. IV. c. 105). By this latter Act the rights of wives thereafter to be married were placed upon a new footing which does not seem likely to undergo any future change. It allows dower out of mere rights of entry; and also out of mere equitable interests, thus terminating

* It was solely upon this ground that Lord Somers persuaded the House of Lords to assert their efficacy, in the great case of *Lady Radnor* v. *Vandebendy* (Show. Parl. Ca. 69). † Cf. Smith's edition of Fearne, II. 117.

the long injustice which the Chancellors of the fourteenth century had initiated. But on the other hand, it undoes the whole work of seven centuries of judges and Parliaments: postponing the dowress to the husband's creditors, and placing all dower at the husband's mercy; enabling him to defeat it not only by conveyance or by will, but even by a mere declaration that he does not desire it to arise. The propriety of this latter power may be questioned; it removes the widow's right, only to cast it upon an heir whose very name is still matter of conjecture. Such a transfer can only be justified by extraordinary circumstances, but it is the practice of too many conveyancers to effect it in every purchase deed, inserting a "Declaration to bar dower," without any reference to the wishes or circumstances of the purchaser, whose wife is affected thus seriously. To the Commissioners who proposed to create this Declaration, one of their witnesses predicted that it "would be irregular and capricious." It has, indeed proved capricious; but unhappily, only too regular.*

Since these statutory changes, a woman's rights in her husband's realty which in the last century were so much stronger, are now much weaker, than her rights in his personalty; for her "Thirds," unlike her Dower, cannot be divested except by an actual gift (in life or by will), to some other person. It may fairly be asked whether it is not rather in the case of Realty that the right ought to be the stronger; and whether (as I have already ventured to suggest) the juster rule would not be akin to that of Glanvil's time, which whilst imposing no check on the husband's alienations, made them impoverish the heir in preference to the widow.

* It was Lord St. Leonards who first suggested that Parliament should permit "a simple declaration in the deed by which the estate is conveyed," to be a sufficient bar of dower. (Letters to Humphreys, p. 4.) The Commissioners and the majority of their witnesses adopted this recommendation as a part of the very scheme in which they were destroying that indefeasible character of Dower which had been the only ground for Mr. Sugden's proposal. They probably could not divest themselves of the old association of ideas which made Dower seem an incubus with a *caput lupinum*. Three witnesses, however (*First Report*, pp. 258, 313, 405), among them Tyrrell and Nassau Senior, saw that the one recommendation removed all necessity for the other, and left it with no further effect than (in Mr. Senior's words) "to deprive the widow of a proper provision in cases of intestacy."

CHAPTER II.

WIFE'S RIGHTS IN HUSBAND'S PERSONALTY.

OVER the earlier history of these rights we may pass rapidly; for our preceding chapter suffices to describe them down to the epoch at which Feudalism introduced the distinction between realty and personalty. The Saxon law, treating moveables and immoveables alike, had (as we have seen) encouraged husbands to make settlements on the marriage day for the regulation of the widow's share; had permitted such settlements to give her a half of the property if she were childless, and the whole if she had children; and, in the absence of a settlement, had awarded the widow only a smaller share. This smaller share is incidentally alluded to in Ine's law as *one-third;* but there is nothing unreasonable in supposing that a somewhat larger proportion would be given her, when there were no children to take the residue; or that this larger proportion was already fixed (as in the Norman period it certainly was) at *one-half.*

There is too a second custom of which we find no trace until the Norman period, but which we then find so deeply rooted as to warrant the conjecture in which Reeves* and Blackstone concurred, that it had descended from Saxon times. I mean the rule which forbids a husband to dispose by will of more than a fixed portion of his personalty, so that neither the widow's share nor the children's could be bequeathed away by him. (It is perhaps needless to remark that if this rule did prevail in Saxon times it probably applied to realty as well as to personalty. If this were so, there ceases to be any difficulty in understanding why the wife is made a party to so many of the Saxon wills which we possess; and there is no longer the violence that there appeared to be, in the innovation by which the Normans rendered lands altogether undevisable.) Thus the widow's right, though it would be defeated by conveyances which

* I. 22.

the husband made, and even by debts* which he incurred, in his lifetime, was preferred to the claims of his legatees. (It stood, in fact, even in the seventeenth century, on the same footing as her right to her *paraphernalia* stands now.)†

In the charter of Henry I., which is undoubtedly genuine, we find a clause securing to the King's tenants-in-chief the full power of bequest over personalty.‡ The clause is of great importance as marking that the separation between the laws of realty and personalty had now begun; and that the Saxon power of devising land had been lost by at least military tenants. But for our immediate purpose it is of less value; since, as we shall find from Magna Charta, it produced no permanent effect upon jurisprudence, whilst its limitation to the King's Barons deprives it of any value as evidence of Saxon custom. Had it been a concession to the humbler classes, it might afford an argument that their traditions had not accustomed them (as Reeves and Blackstone conjecture) to limitations on the power of bequest. Couched as it is, it seems rather to be an effort of the baronial classes (whom Norman law had perhaps accustomed to greater freedom) to resist the imposition of those Saxon limitations on themselves.

The moveable wealth that our ancestors possessed was so

* Glanvil, vii. 5. Phillips' "Geschichte des Angelsächsischen Rechts," p. 147.

† It is needless to reproduce the arguments by which Selden (*Ux. Ebr.*, p. 300) and Reeves (I. 164) have overthrown Coke's strange mistake upon this subject. He (Inst. 2. 33) represents Bracton as saying that the common custom of the realm allowed the husband to dispose of *the whole* of the personalty by will. But there can be no doubt that Bracton distinctly lays down the opposite doctrine; as also does Glanvil. (The "obscurity" which Reeves complains of in this passage of Glanvil, disappears if the passage be carefully read as a whole. *E.g.*, in the statement that "by the general law of the kingdom no person was bound to leave anything by will to any particular person," Glanvil only means that the heriots and mortuaries, of which he speaks, are matters of local and not general usage. The word "*præcipue*" (*i.e.*, "in the first clause of the will") which Reeves omits, shows this to have been his drift.)

‡ s. 7. "Et si quis baronum vel hominum meorum infirmabitur; sicut ipse dabit vel dare disponet pecuniam suam, ita datam esse concedo. Quod si ipse, præventus armis vel infirmitate, pecuniam suam non dederit vel dare disposuerit, uxor sua sive liberi aut parentes et legitimi homines ejus eam pro anima ejus dividant, sicut eis melius visum fuerit." — Stubbs' *Select Charters*, p. 100. John's barons demanded like power, but Magna Charta refuses it.

small in value and so fragile in character that mediæval English law took little care to protect it;* as the absence of any action for its specific recovery, and the rule which sanctioned all sales of it in market overt however bad the seller's own title might be, would of themselves suffice to show. We shall therefore not be surprised to find that the widow's rights in the personalty of her husband, even when secured by church-door covenant, always continued liable to be set aside by his conveyances; remaining unaffected by the change which in Bracton's time had raised her right over a "*dos nominata*" of realty, into an indefeasible *jus in rem.*

Had those rights remained equally unaffected by the earlier Norman change, which in the case of realty deprived the church-door covenant of its old Saxon power of giving her a larger share than her mere legal third? In other words, was a *dos ad ostium ecclesiæ* of personalty still used in the Norman period for the purpose of enlarging, or merely for that of restricting, the bride's prospective rights? We shall see that (at any rate in the case of a *dos certa*) it was still used to enlarge them.

In Saxon times, the church-door endowment might be either of land or of moveables, and in either case would equally extinguish the widow's rights in the rest of her husband's property, personal as well as real. In Bracton's time both kinds of dower were still employed; but the dower of moveables seldom occurred except in the great towns. For only amongst townspeople would there be rich men whose riches included no land; and a man who had lands would prefer to give his wife dower of them, rather than of property of a more fleeting and fragile character. Moreover, to charge the dower on the moveables would seem an undue burden upon the younger children, who had so recently been dispossessed of the landed inheritance by the growing custom of Primogeniture; a custom which by concentrating the permanent wealth of the family in the hands of the eldest son, marked him out as the proper person to discharge the family's chief duty, the protection of their mother. Where the dower of moveables was employed, such a dower

* Cf. p. 92, *infra.*

if of *ascertained* amount, as it probably would almost invariably be, still retained the effect of superseding all the rights that the law would otherwise have given the widow, even as regarded the husband's real estate;* (though leaving untouched her personal apparel,† any bequest of personalty that he might have made to her by his testament, and any particular articles of furniture like the "widow's chamber" of London, that local custom might allot to her). For by assessing her prospective rights at an ascertained sum, she acquired, instead of a mere proportion of uncertain value, a lien for this definite amount, which the personal estate must satisfy, "quamdiu ibi fuerit unicus obolus," before any of the ordinary debts were paid, and before the claims of the children or the legatees were regarded. Possessed of so paramount a right, she ought not, in any event, it was held, to ask for a fuller portion; but must stand by her lien even though circumstances might ultimately show that her intestate share would really have exceeded it in value.

Yet whilst the *dos* of moveables would thus bar the widow's share of realty, the language of our authorities seems to imply that the (far more frequent) *dos* of realty had not the corresponding effect of barring her share of moveables. The accounts which Glanvil and Bracton give of the rights that a widow had in the distribution of the personalty, make no allusion to any qualification that could be caused by her possessing a landed dower; and yet nearly all the widows whose cases had come under the notice of either of those Justices, must have had such a dower.

I have now attempted—with a minuteness of detail that was too great for the patience of all previous writers and that may probably prove too great for the patience of my own readers—to trace the various changes by which the rights of the widow as established by Saxon law were developed into their modern Norman form, and to

* Bracton, fo. 94. Nihil amplius petere potest nomine dotis de aliis catallis *et tenementis* quam fuerit ei constitutum. Elsewhere (fo. 61) he, like Fleta (II. 57. 11), states this merely as the custom of London; an apparent discrepancy, which disappears when we remember that these personalty-dowers were obsolete, except in London and similar cities.

† "Laws of Henry I." LXX. 22, already cited.

define the part which the *dos ad ostium ecclesiæ* played in this process of evolution. Before proceeding to the further history of my subject, it may perhaps be desirable to sum up in a more compendious form the results at which I have arrived. They may be stated thus:

WIDOW'S SHARE IN HUSBAND'S PROPERTY.

SAXON LAW.	NORMAN LAW.	
	Of personalty.	*Of Realty.*
⅓ if children ½ if childless of what is his at death.	⅓ if children ½ if childless of what is his at death,	⅓ *for life* of what is his at marriage; (whether childless or not.)
Dos ad ostium ecclesiæ may (1) restrict this; or (2) enlarge it to ½ if childless; all if children;	*Dos ad ostium ecclesiæ* may (1) restrict this; or (2) enlarge it to any fixed sum; (any larger share?)	*Dos ad ostium ecclesiæ* may (1) restrict this; or (2) supersede it by personalty; or (3) enlarge it to ⅓ of what is his at any time during coverture;
but creates only a *jus in personam.*	but creates only a *jus in personam.* (She has also an ill-defined interest in the "dead man's share" if he do not dispose of it by will.)	and creates a *jus in rem.*

Two writs have survived, and are quoted by Selden, which record suits brought by widows to recover money dowers that had been promised them *ad ostium ecclesiæ*; twenty marks being claimed in one case, a hundred in the other.* But the causes which we have suggested rendered such chattel endowments so infrequent that at last they became obsolete everywhere; and in another century and a half (A.D. 1406), were finally declared invalid.†

They were revived, however, under another name, after the rise of our modern equity jurisprudence; when Lord King permitted a "jointure" of money to extinguish the widow's claim to dower out of her husband's real estate (A.D. 1719).§

* Regist. Orig. 170 b. Selden also refers to the treatise of Thornton (A.D. 1292). May I be pardoned for questioning whether it is to the credit of a nation whose lawyers and whose legal corporations are the wealthiest in the world, that such monuments of her juridical history as the works of Thornton and of Marrow should never have been given to the press?

† Y.B. 7 H. 4, 13. § *Vizard v. Longden* (2 Eden 66).

One further stage of our subject remains to be traced—that development of the husband's power of bequest, which ultimately placed the widow's rights in his personalty entirely at the mercy of his testament, and produced the triumph of the policy which Henry I.'s barons had vainly tried to initiate. Under the general law of the realm as it stood in Bracton's time, the only effect of a will was to dispose of a limited portion of the testator's personal estate—one-third if he left widow and children, one-half if a widow only. It could no more give away the widow's "reasonable share" of the goods, than a devise of realty—when, three centuries afterwards, wills began to operate on realty—could override her claims to dower. But by stages which even Coke seems to have had no means of tracing, and which now it would be futile to guess at, the owners of personal estate gradually assumed the power of disposing by will of the whole of it. Such a power had been exercised in Bracton's day by the freemen of London; and he excuses their possession of so anomalous a privilege on the ground that it is a stimulus, "necessarium valdè," to their assiduity in accumulating money.* Familiar as the same plea is in our own days in the mouths of the advocates of Settlements and Entails, we may yet doubt whether both they and the great "Father of the common law" do not under-estimate the depth to which Nature herself, without any factitious aid from Jurisprudence, implants the root of all evil in the mind of every substantial burgess.

The power of Testation was still limited by common custom to the "dead man's share" in the reign of Edward III.† And Lyndwood, writing on the ecclesiastical law in the reign of Edward IV., seems to deal with the power of testation as still generally limited in his province of Canterbury to the "dead man's share." He cites without disapproval a constitution of Abp. Boniface, Bracton's

* Bracton, fo. 61. Vix enim inveniretur aliquis civis, qui in vitâ magnum questum facerit, si in morte suâ cogeretur invitus bona sua relinquere pueris indoctis vel luxuriosis et uxoribus malè meritis; et ideo necessarium est valdè quod illis in hac parte libera facultas tribuatur.

† As to the cases in Edward II.'s reign, see Finlason's explanation of Reeves's difficulty. II. 211.

contemporary, which had been republished in Edward III.'s reign by Abp. Stratford, and which mentions this limitation. (He adds, however, a note that some places had a custom which gave the whole of the goods to the widow,* whilst that of others gave the whole to the children; though it does not seem clear whether he regards these customs as wholly precluding the owner from disposing of the goods by his will, or merely as rules of distribution in case he did not choose to make a disposition.

The conflict of customs was, however, sufficiently evenly balanced to cause much doubt for a time as to which was to be regarded as the Common Law;† but by Henry VIII.'s reign the doctrine that a man could bequeath only a "pars rationabilis" of his personalty, seems to have again become well-settled law; perhaps because the proportion which it declared to be reasonable for the widow and children was identical with that which was being generally adopted throughout the country as the other local apportionments mentioned by Lyndwood died out. Thus Finch,‡ writing under James I., treats it as well-established law; and it holds good in Scotland at this present day. But in England by stages, and from causes that we cannot trace (but among which Sir Henry Maine§ ranks the influence of Primogeniture) it dwindled back into a local custom; yet a widely-spread one, prevailing throughout Wales, the province of York, and the City of London. (The strange inversion by

* Selden cites from the records of the Kentish assizes of 1315 (quoted in Fitzherbert, tit. Courone 423), a case where a woman feloniously slew her husband, and fled; and all the goods which were found in their house or outside it, including the crops, were forfeited to the king for her crime; as if all personalty became the widow's, on the husband's death. But so extraordinary a rule must have been only the peculiar custom of an exceptional locality. The manor of Taunton Dene, as we have said, has the yet stranger custom of giving her all the husband's *realty*. See p. 34, *supra*.

† See Reeves II. 211; and III. 93.

‡ "Finch's Law" (Bk. 2. ch. 15). "Whether any will be made or no, his wife and such children as are not advanced by him in his life (as if a daughter be covenably married by him this is a sufficient advancement) shall have a part to their own use; *i.e.*, one-third of all (after his debts paid) to his wife, and the other to his children. And a Writ de rationabili parte bonorum is given to recover it."

§ Ancient Law, p. 225.

which London, after being distinguished by exceptional favour to Wills of personalty came to be distinguished by exceptional jealousy of them, is but one more proof of the chaotic flux and reflux of the English customs upon this subject, between Magna Charta and the Great Revolution.) Even from these strongholds it was however eradicated by Act of Parliament soon after the Revolution; from York in 1693, from Wales in 1696, and from London in 1725.* But these statutes, whilst abolishing so much of the custom of these three districts as restrained the power of testation, left untouched that part of the custom which regulated the distribution of the personalty of men who had neglected to exercise that power, and who therefore died intestate. This materially affected the rights of the widow. The will was preferred to the custom; but the custom was still preferred to the Statute of Distribution. From the days of Edward III. the bishop has been bound to commit the administration of an intestate's goods to some lay kinsman, but the lay kinsman, if he paid the creditors their debts and the widow and children their "reasonable shares" (wherever custom assigned them such), might legally keep the residue for himself, though the Ecclesiastical Law vainly strove to make him recognise the rights of his kinsfolk. It was consequently a material gain to the widow when, many years afterwards, Parliament rendered her eligible for appointment as administrator (21 Hen. VIII. c. 5); the more so, as the Courts came to consider her as being usually preferable to any other applicant for the office. In the seventeenth century all lay administrators were placed by the Statutes of Distribution† under an effectual obligation to distribute the residue in the manner defined by these Statutes; the former of which settled the widow's rights in the residue at a third where there were children, and a half where there were none. The gain to her was enormous; as well because she had previously had no claim upon the administrator (except under an ecclesiasti-

* 4 & 5 Wm. & M. c. 2; 7 & 8 Wm. 3, c. 38; 11 Geo. I. c. 18.

† 22 & 23 Car. II. c. 10; 1 Jas. II. c. 17.

cal sanction which the temporal courts, from jealousy of their jurisdiction, were sedulous to render futile), as also because the ecclesiastical law, like the Roman, excluded her from succession until after all the blood relations. Now in the country at large, the distributable residue upon which this Statute would operate consisted of *the whole* of the dead man's personalty (after paying creditors); but in Wales, York, and London, at the date of this Statute all that he could have disposed of by will, and therefore all that in the absence of a will his administrator had to distribute, was merely a *pars rationabilis* of the whole. Thus the Statute in the country at large would have given a childless widow only half her husband's goods; but in London, York, or Wales she would first receive half the goods by custom, and then the Statute would operate upon the remaining or "dead man's" half, and give her a half of *it, i.e.*, in all, three-quarters of the husband's goods. This local privilege in intestacies was, as I have said, not abolished by the three Statutes that conferred on those localities the complete power of avoiding intestacy; and it survived to our own day. The peculiar customs of distribution of London, York, and Wales, thus favourable to married women, were only abolished in 1856 (19 & 20 Vic. c. 94).

It will thus be seen that in the case of the husband's personalty, as well as in that of his realty, modern English jurisprudence has materially impaired the value of the rights which the Common Law conferred upon every married woman.

CHAPTER III.

HUSBAND'S RIGHTS IN WIFE'S REALTY.

THE doctrine of conjugal unity was never applied in the case of realty with the same consistency as in that of personalty. The seisin of the wife's lands is indeed vested in the husband by the fact of marriage; and he obtains the full right to the occupation, and to the profits, of them until the termination of the coverture; a right which he is fully at liberty to alien. But this is all. Though her chattels become absolutely his, her lands become his only temporarily. At first sight the inconsistency seems inexplicable.

But this contrast which seems so marked to us, would not bear that aspect in an Anglo-Norman's eyes. 'Husband and wife,' we can fancy Ranulf Flambard saying, 'are one; and all that she has becomes his. True, in her lands he only takes a life interest, but it is because there is only a life interest for him to take. No subject in the realm has more.' It is important to remember that the doctrine of conjugal unity was introduced into England at the same time and by the same men as the system of Benefices; and how temporary that system originally considered the vassal's tenure of his fief to be, is shown by the arbitrary fines at which the sons of Rufus' barons had to 'redeem' their father's lands.

No long interval, it is true, elapsed before a strictly heritable character was impressed upon these holdings, by the royal charters which secured the heir from any claim beyond a reasonable relief. But as only lineal heirs were permitted to succeed, even this change did little to render prominent the difference between vesting an inheritance in the husband or letting it remain in his wife. In either case the course of descent would generally be the same; the eldest son of the husband would generally be the eldest son of the wife.

In like manner, our Anglo-Norman would have seen no violation of conjugal unity in the fact that it was only for life that the husband could *alienate* the wife's lands. For, here again, no subject in the realm could do more. The

Conqueror's first step in feudalism had been to take from his tenants the power of alienation, and make every transfer of the fief a new concession from the lord.

Even in Glanvil's time the power of alienation which was possessed by the holder of inherited lands (and it must usually have been by inheritance that a woman had acquired her estates) was so small as to make little difference between the heiress's capacity to alien before marriage, and her husband's utter incapacity to alien after it.* But the general principle was by this time accepted that the husband's rights in his wife's lands were not coextensive with his own. The reaction against Norman policy had enlarged her rights; there was no reason why it should enlarge his.

But modern English law gives husbands two species of interests in the realty of their wives. The more common and more ancient is that of which we have already spoken, which is conferred by the simple fact of marriage, and which entitles the husband to the possession and profits of the wife's lands during their joint lives. But there is also a second, less ancient, and now of rare occurrence, which arises only upon the birth of issue, and by which the husband's first interest is enlarged into an estate for his own life.

(1.) The former of these rights must have been recognised in England from the time of the conquest; and we may fairly suppose it to have existed in Saxon times, though (so far as I am aware) no direct evidence has been preserved of the powers of the Saxon wife over lands that had not been included in the matrimonial settlements. It is essential, not only to the system of conjugal unity, but even to that of community of conjugal goods, which probably† preceded the Anglo-Norman theory. The common law has always treated the seisin of the wife's lands as being, from the moment of her marrying, or of her acquiring them after

* Glanvil. vii. 3. Mariti mulierum quarumcunque nihil de hereditate uxorum suarum donare possunt sine consensu heredum suorum vel de jure ipsorum heredum aliquid remittere possunt, nisi in vita sua.

† *Supra*, p. 12.

marriage, vested by act of law "in the husband and wife jointly, in right of the wife." Her inability to perform any legal act as an independent person, renders all the benefit of this joint seisin his alone. He may occupy the lands and exclude her from possession, he may demise them, and recover, receive, and squander the rents of them, in spite of her protest.

The husband, however, could only give what he himself had; and any lease he might make of such lands would come to an end with the coverture. The value of his marital life interest was materially enhanced by "The Enabling Statute" of 1540,* which permitted him to make an indefeasible lease for three lives, or twenty-one years; whilst it rendered such leases more advantageous even to the wife than a common law lease might have been, by making her concurrence essential to their validity, requiring the rent to be reserved to the husband and wife and *her* heirs, and rendering that rent inalienable during coverture without her consent. The Settled Estates Acts of 1856 and 1877 (19 & 20 Vic. c. 120, and 40 & 41 Vic. c. 18) which have superseded this enactment, belong to the general law of tenancies for life, and call for no detailed notice here.

Equity followed the law by conceding to the husband the full enjoyment of the wife's realty throughout the coverture, though from the beginning of the seventeenth century it has permitted that enjoyment to be reserved, by express disposition, to herself separately.† The legislature has, however, interfered in the present reign to render the husband's seisin a merely fiduciary one, in two cases.‡ Firstly, where lands are purchased with money that has been earned by the wife's own exertions since the passing of the Married Women's Property Act,§ (whatever may have been the

* 32 Hen VIII. c. 28. Reeves III. 265, 371. Bright I. 199.

† *Infra*, Part III. ch. I. See another, but rare, exception, *infra*, p. 90.

‡ 33 & 34 Vic. c. 93. (Passed August 9th, 1870.)

§ Sec. 1. "The wages and earnings of any married woman, acquired or gained by her after the passing of this Act in any employment, occupation or trade in which she is engaged, or which she carries, on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, scientific skill, and all investments of such wages,

date of the marriage). Secondly, where the wife has been married since the passing of that statute, and the lands have devolved upon her *by descent*.* Had they come to her by conveyance or devise, the settlor would himself have created the separate use if he had wished to exclude the husband; but where she receives them only "as heiress or co-heiress of an intestate," the law may justly supply the common precaution which his testament would probably have provided.

(2.) The husband's interests undergo, as we have said, a change immediately on the birth of a heritable child. He ceases to be seised merely in right of his wife, and is henceforth tenant in his own right. But his tenancy is not "consummate," and no change is practically felt, until the death of the wife. Then, the lands which otherwise would have passed away to her heirs remain in his hands for his life, even though the child whose birth gave him this new interest be no longer living.

The existence of any right at all on the part of the husband, in the realty of a deceased wife, presents at the outset a problem difficult of solution. No trace of such a right is to be found in our extant monuments of Saxon law; it is at variance with the Roman theory of succession; and the general feudal law of Europe expressly repudiates it.† Yet in English, Scotch, and Norman feudal law it occupies from the outset a prominent place; a life interest,

earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money and property."

* Sec. 8. "Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act, as heiress or co-heiress of an intestate, the rents and profits of such property shall (subject and without prejudice to the trusts of any settlement affecting the same), belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same." [The language of this clause appears to cover cases where the ancestor died before the marriage, though not cases where he died before the Act.]

† See Wright's Tenures, p. 194, citing "Feud. I. 15; II. 13, 85; Ravenna in Consuet. Feud. 15; and Stry. Exam. Jur. Feud. xvi. 22, 23." The words of Feud I. 15 are, "Si fœmina habens beneficium et maritum moriatur, nullo modo succedit in beneficium maritus nisi specialiter investitus fuerit."

under the name of "curtesy" being given to the husband, if his wife have borne him an heir. Whence did this right come?

Its appearance in Scotch law will present no difficulty if we remember the influence that Glanvil's book, in the guise of "Regiam Majestatem," had upon the North Britons; whilst Norman and English law form practically but one code during the long period of their mutual action and reaction between William's time and Cœur de Lion's. The ancient phrase which denominates the tenant of this estate "*tenens per legem Angliæ*" may well point to a time when the custom was unknown except between Tweed and Channel. So marked a name can scarcely have been given merely (as some writers think) to indicate that the English widower, unlike the Norman* and the Kentish, retained this estate even after remarrying. If so, the name ultimately given to the estate, "Curtesy of England," must rather indicate that *curialitas* was peculiar to England, than merely that the English *curialitas* was of a peculiar duration. (It is needless to explain that "curtesy," or *curialitas* does not refer to the complaisance of the legislator who conferred this right upon widowers; Cowel's "nationis nostræ humanitas," and Spelman's "gratia legis Angliæ." It simply expresses the fact that the husband, taking the whole fief, becomes, on the birth of issue, tenant in his own right to the lord of the manor, and therefore sits with the other vassals in the court-baron (*curia, curtis*); whilst a widow, since her dower is only a part of the fief, becomes only tenant to the heir.)

The real difficulty then is to account for its appearance in England, and three theories have been suggested for this purpose. The *Mirror* says thatHenry I. created it. But Nathaniel Bacon† supposes it to have been of Saxon origin (and therefore called Curtesy "of England"), to have afterwards become more and more obsolete, and finally to have been revived—not created—by Henry. This view is to some extent corroborated by the fact that *one* old German

* Grand Coutumier, c. 119. "Tant comme il se tiendra de marier."

† *English Government*, pp. 105, 147.

code—in a law to which I shall return—did confer a right more or less similar.* Sir Martin Wright, however, considers both these theories incompatible with the fact that none of our early English codes, nor even the "Laws of Henry I." make any mention of it; and he prefers to adopt a suggestion thrown out by the eminent Scottish jurist, Craig,† who notices its resemblance to Constantine's rule of the *peculium adventitium*, which gave the father a life interest in all property that came to the son from the mother. This rule, Craig conjectures, may have been copied by the English judges, after Vacarius had introduced them to a knowledge of the Roman law. (We have already seen, in the prohibition of post-nuptial donations, how freely the judges, in the century following Vacarius, could import Roman rules into English courts.) This theory certainly has the advantage of accounting for the curious fact that Curtesy (unlike Dower) can only arise where there has been issue of the marriage. On ordinary principles a husband's claim, intermediate between that of the wife's lineal heirs and that of her collateral ones, would seem more likely to be barred than created by the birth of issue.

Blackstone's "substantial feudal reasons" for establishing curtesy, seem sufficiently refuted by the fact that general Feudalism never did establish it; and Christian's "natural and rational" reason (that it was established to prevent the father from being dependent on the child) by the fact that there is no curtesy of the wife's lands when her child is a remainderman, or when he is heir to *them* otherwise than as heir to *her*.

Passing from conjecture to the solid ground of history, our earliest authority on this subject is a passage in Glanvil (Book VII.). I say in Glanvil, for it is impossible to give the name of authority to the historical statements of so untrustworthy a book as the *Mirror*, uncorroborated, as it

* Leges Alamannorum c. 92. (Copied by Blackstone from Wright.) Gunderman, in his *Englisches Privatrecht* (Tübingen, 1864, p. 167), says that a right analogous to Curtesy still exists in the peculiar customs of some localities in Germany; referring for his authority to Bluntschli's *Deutsches Privatrecht II.*, 236—239.

† De Jure Feud., 312.

here is, even by the "Laws of Henry I." Nor does internal evidence increase the credibility of the passage, which runs thus:—

"Grant fuit de la curtesie le Roy Henry le primier que touts ceux qui survivissent lour femmes dount elles ussent conceives tenussent les heritages lour femmes à touts jours." (*Mirror*, c. 1. s. 3.)

If this means that the widower was to receive in fee simple the wife's inheritance, it is an assertion in the teeth of all probability and all analogy, incompatible with the rights of feudal seignory, and at variance with all subsequent law. Yet surely "à touts jours" can reasonably bear no other sense (as even Mr. Finlason, the chivalrous defender of the *Mirror*, admits*). The passage almost seems as if invented to afford an explanation—and as we have seen, not the true one—why the name "curtesy" was given to the widower's estate.

Glanvil alludes to curtesy only in connection with the law of *Maritagium* or *dowry*, (which alone corresponds to the "dos" of Roman law, though Glanvil uses that word both in this sense, and also in the sense of the English *dower*). The Maritagium was given by the woman's friends as a provision for her and her issue. It was not necessary, as with dower, that it should be given at the time of the marriage contract; it might be given before or even after the marriage. It might come either from her relations or from a stranger. And the favour shown to it by the law is evidenced by the fact that amidst the general prohibition of alienation in Glanvil's time, an alienation might nevertheless be validly made (even in the case of lands descended, and even against the expectant heir's protest), whenever it was made as a *maritagium*, even to a bride who was not of kin to the alienator. It descended to the woman's issue; and remained free from all homage until it reached her great-grandson's hands, like the Norman *parage*, or the inherited lands of a younger daughter.†

The gift might be made, either to the woman and her

* "*For ever*, which is quite different from the tenancy by the courtesy as it afterwards was settled." Finlason's Reeves I. 75.

† Glanvil, VII.

heirs solely, or to herself and her husband (and their heirs) as joint tenants.* Of these alternative modes, the latter would appear the more appropriate form if the gift were made at or after the marriage, and the other if the gift were made before it. (For as we have said, Maritagium, unlike Dower, could be given at any time.) Either form would place it in the possession of the husband, and give him the profits of it, throughout at least the duration of the coverture; but the latter form, rendering him a joint tenant, would prolong his interest until his own death, even if he survived both the wife and the issue of the marriage. It is probable that, from fear of the match being broken off, the maritagium would seldom be given before the marriage,† and therefore this latter form would be the more frequent, and would thus come to constitute in lawyers' minds the normal type of maritagium. If so, the inference would easily be drawn (especially if aided by the Roman analogy which Craig points out), that under either form of Maritagium, given as it always was with an avowed view to the husband's benefit,‡ his claim to a life-provision was paramount to that of the issue; and, if the issue died out, would still exclude the donor's right of entry. To prefer his claim to the donor's, where the estate had been given to the wife solely and no issue had been born at all, and the estate consequently (from the very nature of the ancient 'Fee Conditional') had never given any prospect of enduring beyond the death of the wife herself, was a further step so pronounced that it was never taken in the realm at large; yet in Kent, where the tenants were so much stronger in the shiremote, even this inroad was effected. (But Curtesy was never allowed where the estate had been originally given for the wife's life only.)§

It is important to repeat that except in connection with

* Bracton fo. 21.

† St. Martin, in his edition of the Etablissemens de St. Louis (p. 258 n.), treats it as usually given *at* the marriage, in France.

‡ "Promittit se ducturum in uxorem mulierem, et *ei* maritagium promittitur ex parte mulieris." Glanvil.

§ Bracton 22b.

Maritagium, Glanvil never mentions Curtesy. Upon the argument from silence, when standing alone, too much stress must not be laid. But it is here corroborated by the facts that in a document of earlier date than Bracton, which some class as a "Statutum incerti temporis," Curtesy is treated as arising only from a Maritagium;* that in the Etablissemens de St. Louis we find Curtesy expressly limited to the Maritagium, which the husband received *ad ostium ecclesiæ*;† and that in that ancient German law to which I have already referred, it seems to be limited in like manner to the wife's *Fatherfee*.‡ We may therefore fairly infer that Glanvil had no knowledge of it as a right attaching upon a wife's lands in general.§ This seems incompatible with the theory of such a general right having been established either by the Saxons or by Henry. I venture to conjecture that this right arose out of the Maritagium through the process of reasoning suggested in the last paragraph; and once established in such cases, was extended thence to all the woman's lands. And in offering this theory I would submit that it not only traces an easy and probable course of development, but that it affords (which the other theories do not) an intelligible explanation of the strange restriction which makes the widower's right dependent on issue having once been born, yet independent of their surviving their birth —a restriction inexplicable except as the offspring of the "Fee Conditional."

When we pass to Bracton's account of curtesy, a century later, we find that the right has become general. It extends to every estate of inheritance, whether the wife received it

* The *Statutum de Tenenentibus per legem Angliæ*. The editors of the Revised Statutes (I., 129) quote Rastall's note, "This seemeth to be no statute, but only one man's opinion." It does not, however, appear to have ever been noticed that the document is a copy of Glanvil, vii., 18, with the addition of three lines conceding curtesy to second husbands.

† *Etab. de St. Louis, I.* 11. "Gentishoms tient sa vie ce que l'en li donne a porte de monstier en mariage, après la mort sa feme, tout n'eut il nul hoir, pour qu'il en ait eu hoir qui ait crié et bret; se ainsi est que sa femme li ait esté donnée pucelle." (*I.e.*, a second husband could not claim Curtesy; which, we shall find, became a matter of dispute in England.)

‡ See below, p. 81.

§ Reeves I. 171, 323.

by descent, by ordinary gift, or as maritagium;* and is given to the widower, whether he were her first husband or not. This latter point was however condemned as bad law ("injuriosum") by Stephen de Segrave (Chief-Justice, A.D. 1232-34), who had made a special study of this subject, and is supposed to have written upon it.† He insists that curtesy ought, in strictness, to be claimed by a first husband only; a restriction of the right which is unintelligible except on our supposition that the claim originally arose only as a result of the settlement that had been made upon the bride at her marriage with him.

The earliest case in which I find the modern name given to this interest, and the tenant said to hold 'by the *curtesy* of England' instead of 'by the law of England,' is in the Yearbook of 1302. There a widower claims "fraunctenement *par corteysie d'Englistere.*"‡

* Bracton 437. "Si quis (cum hereditatem habuerit vel non habuerit) uxorem duxerit habentem hereditatem vel maritagium vel aliquam terram ex causâ donationis, si liberos inter se habuerint ex justis nuptiis procreatos si uxor præmoriatur, remanebit viro hæreditas et terra sua totâ vitâ ipsius viri, sive superstites fuerint liberi sive mortui omnes vel quidam; dum tamen semel aut vocem aut clamorem dimiserint quod audiatur inter quator parietes, si hoc probetur. Et quod dicitur de primo viro dici poterit de secundo, si postmodum nupserit secundo viro; sive de primo viro heredes habuerit apparentes sive non, plenæ ætatis vel minoris ætatis. (Quod quidem injuriosum est secundum Stephanum de Segrave, maxime cum de primo viro heredes habuerit, quod quidem sustinere posset si nullos habuerit; dicebat enim quod lex illa malè intellecta fuit et malè usitata, quia quod dicitur de lege Angliæ intelligi debet de primo viro et eorum heredibus communibus [*i.e.*, the exclusion of heirs by a widower], et non de secundo, maxime cum heredes apparentes extiterint de primo.) . . . Si autem terra vel hereditas acciderit post mortem uxoris hoc pertinebit ad heredes si fuerint plenæ ætatis, et ad capitales dominos custodes si infra ætatem extiterint . . . quia nihil amplius retinere potest per legem istam nisi id quod in vitâ uxoris accedit."

† The remark of Mr. Digby in his admirable History of the Law of Real Property (III. 2. 17), that "the law was settled in accordance with the opinion of Segrave by the Statute of Westminster II.," is surely too generally expressed. The clause in that Statute applies only to estates in frank-marriage or tail-special. Until this enactment it was not necessary, as now, that the issue should be such as could inherit the lands in question.

‡ Y. B. 30 Edw. I., 125. This case turned on the clause in De Donis, of which I have already spoken; and decided that it did not apply where the frankmarriage had been given before its enactment, even though the wife did not die until after the statute.

Having thus traced Curtesy into the form which it retains to our own day—an estate for life accruing to a husband in his wife's lands of inheritance, as soon as he has by her heritable issue born alive—we may turn aside to notice a curious phrase employed by both Glanvil and Bracton, which survived for centuries later as a puzzling technicality in lawyers' definitions of curtesy. It was required, we have seen, that the child should be born alive; a requisition which was imposed alike in England, in Scotland, and by St. Louis, (though the custom of Normandy* only insisted that the child should have quickened.) Now the test of life, from Glanvil downwards, is made to consist, as the Prussian Code to this day makes it,† in its having uttered a cry; which, says Bracton, even though born deaf and dumb it is sure to do;

"Nam dicunt E vel A, quotquot nascuntur ab Evâ."

(He shows a more accurate knowledge of physiology‡ than his remote successor who, in Henry VIII.'s reign (A.D. 1537), finally overruled the necessity for proving a cry, on the ground that the child might be born alive, and yet being dumb might be unable to cry.)§

The strange point is this, that both Glanvil and Bracton require the cry to be heard "*within four walls*,"‖ an apparently aimless addition; which nevertheless is reproduced by every subsequent writer; and seems from a remarkable record, very little posterior in date to Bracton (and unfortunately inaccessible to Reeves), to have formed an essential element in the verdict, when an issue as to the child's having been born alive was referred to the finding of a jury.¶ Now this apparently aimless addition is strangely

* Grand Cout., c. 119.

† I. 1. 12; and I. 12. 13. (These references I owe to Casper).

‡ On the power of utterance of deaf-mutes, see Casper's *Forensic Medicine* IV. 11.

§ Dyer, 25. (Littleton writes as if, by his time, some doubt had arisen as to the cry being the only admissible proof of life). Cf. Justinian, Cod. 6. 29. 3.

‖ "Clamantem et auditum infra quatuor parietes." Glanvil. "Aut vocem ut clamorem dimiserint quod audiatur inter quatuor parietes." Bracton.

¶ *Abbreviatio Placitorum*, p. 267. "(5 Edward 1st. Wigorn.) Jurata dicit quod Johannes de Cantelupo suscitavit quendam puerum de Margeria de Hane-

suggestive of a passage in that ancient German law, already referred to, which Wright mentions as an anticipation of curtesy. We are there told that if a wife who holds lands that have come to her from her father should die in childbirth, her husband may retain her land if the child continue alive a little while, though it be but for an hour, so as to be able to open its eyes and see the roof of the house *and the four walls.** There was no Berkeley in King Chlotarius' court, to suggest to these primitive lawgivers the doubt whether the infant's visual sensations would convey to it any idea of either wall or roof. It is, however, impossible for us to ascertain whether Glanvil drew his mention of the "four walls" from Germanic tradition, or copied it directly from Roman law, where (according to Casper) it occurs before Justinian's time.

Our English lawyers seem to have been compelled to select from the various possible proofs of life the *audible* one, on account of the peculiarities of their own system of evidence and procedure.† Women, by a disqualifi-

curt, quæ de Rege tenuit in capite, qui natus fuit et baptizatus et nominatus ad nominationem mulierum 'Johannes;' sed dicunt præcise quod nunquam auditus fuit clamare *infra quatuor parietes*. Postea in crast. purificat. Beatæ Mariæ apud Wodestok coram Rege et suo consilio, quamvis convictum fuit per juratam quod quidam puer natus fuit de prædicta Margeria qui ad nominationem mulierum nominatus fuit Johannes; tamen *quia femina non admittitur ad aliquam inquisitionem faciendam in Curiâ Regis*, nec constare potest curiæ utrum natus fuit vivus puer vel non, nisi visus esset a masculis vel auditus clamare ab eisdem; ac nunquam a talibus visus fuit vivus nec videri potuit; et quod *non est permissum quod masculi intersint hujusmodi secretis;* et similiter convictum est per juratam quod nunquam ab aliquibus hominibus masculis auditus fuit clamare. Videtur curiæ quod prædictus Johannes tenere non debet hereditatem prædictæ Margeriæ per legem Angliæ ratione prædicti pueri. Ideo consideratum est quod prædictus Johannes nihil capiat per querimoniam suam."

* Leges Alamannorum, c. 92; in Lindenbrog's *Codex Legum Antiquarum* "Si qua mulier quæ hereditatem paternam habet post nuptum pregnans peperit puerum et in ipsa hora mortua fuerit, et infans vivus remanserit aliquanto spatio (vel unius horæ) ut possit aperire oculos et videri culmen domûs *et quatuor parietes*, et postea defunctus fuerit, Hæreditas materna ad patrem ejus pertineat; et tamen si testes habet pater ejus, quod vidissent illum infantem oculos aperire, et potuisset culmen domûs videre et quatuor parietes, tunc pater ejus habeat licentiam cum lege ipsas res defendere."

† Bracton 438. Cum responsum fuit ex adverso quod nullus talis procreatus fuit nec vocem emisit, oportet tenentem probare contrarium per sectam suffi-

cation borrowed from the Canon law, were not allowed to take part in an "Inquisition." And even if they had been, midwives, according to Bracton, were so frequently suborned by widowers who wished to claim curtesy, that their testimony would have carried little weight. "The godly midwives of Egypt lied," as Bunyan puts it; and their less devout successors retained the habits of the profession. Consequently some one else must be produced who from his own perceptions, and not from hearsay (which might merely have originated with the suborned midwives), could establish that the child had actually lived. But this perception could only be one of hearing, not of sight. For, as the record I have mentioned tells us—here completing what was omitted in the reasoning of Bracton—the prudery of mediæval obstetrics "did not permit the presence of a male at such mysteries;" and the husband's witnesses must therefore content themselves with listening outside the "four walls" for an infantine wail. Such a plan, as Bracton admits, of course left expectant heirs at the mercy of a conspiracy for a supposititious birth; and we may well believe that the collateral presumptive heirs of every married lady in the days of the Plantagenets, entertained all an Orangeman's jealousy of the warming-pan.

Since the thirteenth century the law of curtesy has undergone no permanent change. The widower's rights shared, it is true, in the inroads which the introduction of equitable ownership made upon the widow's rights of dower. The clerical Chancellors refused to allow him curtesy of the mere "use" of lands.* But their successors in the eighteenth century adopted a different rule for the modern Trust. In

cientem quæ audivit clamorem in propriâ personâ, et non ex relatione aliorum vel auditu, qui omnes bene examinentur tam de die quam de loco quam de horâ et de aliis circumstantiis. . . Licet vocem non emiserit solent obstetrices in fraudem veri heredis protestari partum vivum nasci et legitimum; et ideo necesse est vocem probare, et licet naturaliter mutus nascatur et surdus, tamen clamorem emittere debet sive masculus sit sive femina

"Nam dicunt 'E' vel 'A,' quotquot nascuntur ab Evâ."

. . . Sed quid dicetur si uxor revera partum non peperit sed supponatur partus qui clamorem emiserit? Hoc probato cadat exceptio. [This shows to what fraud the exclusion of the witnesses from the room exposed the heir.]

* Perkins, 349, 363, 457, 463; *Chudleigh's Case*, 1 Rep. 123 b.

1708 Lord Cowper* decreed curtesy of a trust estate, admitting it to be a point "of some difficulty," but proceeding on the principle that trust estates "were to be governed by the same rules, and were within the same reason as legal estates; and as the husband should have been tenant by the curtesy, had it been a legal estate, so should he be of this trust estate. If there were not the same rules of property in all courts, all things would be, as it were, at sea, and under the greatest incertainty."

We have seen Lord Talbot's disapproval of this case, but it is based on a sounder principle than his own decision which exempted Trusts from Dower. Inconsistent as the two doctrines are (for the rights of the widow and the widower should stand or fall together), that of Lord Talbot has been maintained only from motives of urgent convenience, and not on grounds of legal principle. An eminent Equity lawyer has ventured the sarcasm that this difference between curtesy and dower arose "merely because the ladies were not the judges who settled the law."†

It remained, however, for nearly two centuries a moot question whether the widower could claim curtesy of lands which had been given in trust for his wife *for her separate use.* Sir Joseph Jekyl, who seems to have been the first to suggest the question, thought the court would refuse curtesy.‡ Lord Hardwicke's views on the point seem to have vacillated. In very recent years it became the subject of conflicting decisions given by Vice-Chancellors Stuart and Malins; but was determined in 1877 by Sir George Jessel in a judgment which has received the unanimous approval of the Court of Appeal. He held the husband to have only an inchoate right to curtesy, which the wife may defeat by her disposition; but which prevails against the heir if she die without having alienated or devised the separate estate.§

* *Watts v. Ball,* 1 P. Wms. 108. Cf. *Sweetapple v. Bindon* and *Otway v. Hudson* in 1705 and 1706 (2 Vernon 537 and 585).

† Mr. John Bell, K.C. First Report of R. P. Commissioners, p. 232.

‡ *Bennet* v. *Davis,* (2 P. Wms. 316); cited *infra,* p. 103.

§ *Cooper v. Macdonald* (L. R. 7 Ch. D. 288). Cf. Davidson's Preced. 3. 101 *n.*

One futile attempt has been made to change the common law by statute. The Real Property Commissioners proposed to remodel the law of curtesy; partly by assimilations of it to the gavelkind custom, abolishing the necessity for the birth of issue, and restricting the estate, in the case of a *second* husband, to a moiety of the lands; partly by an assimilation of it to their rule for dower, allowing curtesy even of lands in which the wife had merely a right of entry.* A Bill was introduced in 1831 to carry out these proposals; but it never became law.

The witnesses whom the Commissioners examined were almost unanimous in desiring to make the birth of issue no longer a necessary condition; but one witness gravely preferred to preserve it, as an incentive to the husband to abstain from behaving violently to a wife in her first pregnancy. Such an argument presupposes a somewhat novel estimate of the domestic manners of the English landowning classes.

* First Report, pp. 19, 20.

CHAPTER IV.

HUSBAND'S RIGHTS IN WIFE'S PERSONALTY.

IN this region a nearer approach was made towards practically realising the theory of conjugal unity. The common law transferred to the husband every 'chose in possession' that was the wife's at marriage, or that accrued to her during coverture; whether it were really in her possession, or were in the hands of some third party. All such things became his absolute property simply in virtue of his marital character. He could use, destroy, or assign them; could bequeath them by will if he survived the wife, and (with the exception of Paraphernalia*) even bequeath them away from her when she was the survivor.

In her 'choses in action' only a more qualified and conditional property was conceded to him. Here the only effect of the marriage was to transfer to him not the wife's ownership, but merely her power of suit, not her full right but merely her remedy. Whatever she could do might be done by him. If, therefore, on the one hand, the chose in action were or became recoverable during coverture, he could sue for it; and as on being recovered it of course passed into the category of choses in possession, it thereupon became entirely his by the rule we have already stated. When such a chose in action was of the exceptional kinds which (ultimately) the law permitted to be assigned, when, for instance, it was a bill of exchange or promissory note, his assignment was regarded as a reduction into possession and passed not merely his own qualified ownership to the assignee, but a full title.† (At one time such negotiable securities were regarded as choses in possession even whilst still in the husband's hands, and therefore as fully, not

* *Infra*, p. 87.

† The Judicature Act of 1873 has now rendered all choses in action assignable at law. I am not aware that any decision has yet been given as to the possibility of an assignment under the Act operating to exclude the wife's rights, when the coverture determines before the assignee has reduced the chose into possession. Happily the equitable, though not the legal, analogy is against such an exclusion.

qualifiedly, his own.*) If on the other hand the chose were of such a character as to be unrecoverable during the marriage (*e.g.*, if it were a bond payable after his or her death), he of course obtained no such opportunity of suing, and thus acquired nothing then by marital right. In either case, if the chose were still unrecovered when the coverture came to an end, it would be again the wife's absolutely if she were the survivor; and if she were not, would vest in her administrator for his own benefit. But by the Statute of Distribution† the beneficial interest was given to the widower; and by the Statute of Frauds the widower obtained the right to be administrator.

Leaseholds were practically nothing more than a species of choses in action, until the writ of *ejectio firmæ* became accepted as a means of securing specific recovery of possession in lieu of mere damages for breach of covenant—a change which, at the earliest, cannot have taken place till the latter half of the thirteenth century. It was therefore natural that even after they became *jura in rem* the law should continue to treat them upon the accustomed footing. If the lessee died, they still devolved upon the executor, not the heir; if she married, they still became the husband's only in the old qualified manner. Hence like choses in action, they (firstly) do not fall under his power at all if they are such as cannot be sued for during the coverture; and (secondly) they cannot in any case be affected by his will, but survive to her free even from the claims of his creditors.‡ Leaseholds were assignable, and therein of course differed from the great majority of choses in action. But assignments of them were dealt with by precisely the same rules as we have found applied in the case of an assignable chose in action. The assignment, if entire, ousted the wife's rights, and passed to the assignee that complete title which the husband himself did not possess. One difference must, however, be remarked between the rules of choses in action

* *Bright*, I. 27—38. † Cf. p. 68 *supra*.

‡ In Y. B. 18 Edw. 4, 11, it is laid down that a bond which was payable to the wife before her marriage can not be sued upon after her death by the husband *qud* husband, *because her death determines his interest*. He must clothe himself with the further character of administrator.

and those of leaseholds; if the wife die before the husband, any leasehold of hers in possession which is still unassigned, at once becomes his absolutely by marital right, without the necessity of his taking out letters of administration, as in the case of a chose in action.

The husband's rights are thus strongest in the case of ordinary choses in possession, less strong in Paraphernalia, still less in chattels real, and weakest in choses in action. I have postponed till now the consideration of Paraphernalia, as they require a somewhat detailed notice.

We have found in the "Laws of Henry I." that a Wessex widow was entitled, in addition to her allotted share of the personalty, to retain her bed and her apparel on the death of her husband. We have also found that in Bracton's time her personal attire and ornaments were more commonly permitted to pass under her will than any other of her chattels. Even in much later days it was contended at the bar that she might dispose of such articles by will without obtaining the assent of her husband.* In Scotland she is still permitted to do so;† and in default of a will, they devolve on her children or other next of kin, not on her husband.

But here, as in the case of her other personalty, the Anglo-Norman theory obtained a victory over the Saxon, and the wife lost all disposing power over her *wif-scrud*, or—in the newer phrase, ill-chosen to express an ill-understood analogy—her *paraphernalia*.‡ In vain did civilians like Lyndwood insist that she must be regarded as true owner of them "etiam stante matrimonio." Yet here a trace of her Saxon capacity of ownership did survive; for the common law gave her apparel to her on her husband's death, in spite of any bequest he might have made to the contrary. The rule of Conjugal Unity must give way to that of necessity;

* By Serjeant Vavasor, Y. B. 18 Edw. 4, 11 b; and Serjeant Constable, Y. B. 12 Hen. 7, 22. See also 33 Hen. 6, 31 b. For Wessex rule, see *supra*, p. 31.

† Bell's *Principles*, par. 1559.

‡ The Roman *parapherna* (*paraphernalia* also occurs) were the property which the wife retained in her separate ownership, and did not tie up in the marriage settlement. Ours too are *extra dotem* (παρὰ φερνήν); but the Roman dos and the English are very different things.

"pur ceo que necessaire que el ne alera naked, mes d'estre conserve del shame et del cold."* This concession was liberally construed in Elizabeth's reign as extending even to jewellery, so far as it was suitable to her rank.† Some writers also give her, exactly like the Wessex wife, a bed. Noy makes the common law give the widow her bed and her coffer (*i.e.*, clothes-chest.) Comyn also gives her the bed; but only on the authority of a reference to Rolle, which does not bear him out. But however the common law may have stood, it is clear that not only her bed but even the furniture of her bedroom was conceded to her by the customs of the city of London and the province of York, under the title of "The Widow's Chamber."‡

Paraphernalia are thus treated almost exactly as the wife's chattels real. There is, however, one difference. A leasehold which the husband has not disposed of in his lifetime survives to the wife free from all the claims of his creditors. But in the case of paraphernalia, as the judges grimly warned Lady Bindon, "Payments des debts sont destre preferre devant allowances de juels al ladies." She has, in fact, precisely the same right in paraphernalia that she had in the *pars rationabilis* down to the seventeenth century.§

In the eighteenth century the Court of Chancery came to her aid, to protect her against both her husband's creditors and himself. Lord Macclesfield refused to charge the paraphernalia with the husband's debts, so long as 'real assets' were forthcoming to pay them;‖ and Lord Hardwicke¶ compelled the husband's executors to redeem paraphernalia which he had pawned.

But in the same century Sir Joseph Jekyl initiated a principle which Lord Hardwicke securely established,** that

* Rolle I. 911.

† *Lady Bindon's Case* (Moore 213). A.D. 1585. Lord Burleigh and Sir Christopher Hatton were the plaintiffs, as executors of Lord Bindon.

‡ Bright's *Law of Husband and Wife*, Bk. I. ch. xviii. s. 1.

§ Supra, p. 67. Cf. *Lady Tyrrell's Case*, A.D. 1674, (1 Freem. 304).

‖ *Tipping v. Tipping* (1 P. Wms. 730). A.D. 1721.

¶ *Graham v. Londonderry.*

** *Lucas v. Lucas*, A.D. 1738; *Graham v. Londonderry*, A.D. 1746. (3 Atk. 393). Both were cases in which the husband's father had made the wife a wedding present of jewels.

has gone far towards superseding the whole doctrine of Paraphernalia. They held that if articles of the class of paraphernalia be given to a woman by a third party, either after her marriage or in view of it, it must be presumed that the giver did not intend to make a present to the husband, but to render the articles the property of the wife. The husband will accordingly hold them as a mere trustee for her separate use; they will not be liable for his debts, and it will be a breach of trust if he alienates them. (The peril here, as in all cases of personalty where a third party is not interposed as trustee of the separate estate, is that the husband's legal possession will enable him to pass a good title by a fraudulent alienation, if the alienee give value and have no notice of the separate trust).

But Lord Hardwicke refused to extend this presumption to cases where it was by the husband himself, even though before their marriage, that the articles had been given to the wife. He, unlike third parties, provides her with personal ornaments not solely for her own gratification, but with a view to the propriety of appearance which his position requires her to maintain. Hence in the absence of express evidence that he meant them to be her separate estate, "they are to be considered merely as paraphernalia. And it would be of bad consequence to consider them as otherwise; for if they were looked upon as a gift to her separate use, she might dispose of them absolutely, which would be contrary to his intention."* Cases therefore still occur in which the wife's only protection is derived from the ancient rules.

In the various ancient modes of dealing with the various species of the personalty of married women, Equity was at first content to follow the law. But ultimately this branch of her jurisprudence became one of considerable complexity; the chancellors wavering between, on the one hand, their reluctance to upset the established rights of property, and on the other their desire to afford to women's interests that protection which the traditional connection of their office with ecclesiastical and with Roman law suggested to

* Lord Hardwicke, *loc. cit.*

them, and which their judicial experience showed to be necessary.

Their interference was probably hastened by that great expansion of our commercial activity which followed the Reformation. An increase equally vast and sudden took place in the nation's movable wealth; and this happened to be the very species of property upon which the common law of marriage bore most oppressively. The chancellors had not the hardihood to repudiate as inequitable the doctrine which merged the wife's person in that of the husband; but they refused to regard it as a fundamental principle. They permitted private agreements and dispositions to invest the wife with a separate ownership which stood unaffected by all the rights which the marriage had conferred upon the husband, and all the disabilities which it had imposed upon the wife. Thus Equity whilst accepting the doctrine of marital headship, came to regard it as capable of suspension by the mere contract of individuals; though on the other side of Westminster Hall it was held so fundamental that even immemorial local customs would not avail to suspend it.

A concession was thus made to the exigencies of experience. "Separate Estate" was recognised in Chancery as a juridical possibility; and might be given to a woman in spite of her coverture. But this was all. Where the donor had not impressed this character on the gift, the equitable rights of the husband in all personalty that accrued to the wife were co-extensive with his legal rights. A check, however, was at last imposed upon him by the Chancellors, who established the "Wife's Equity to a Settlement" almost immediately after they had established the principle of Separate Estate. These important creations of the Court of Chancery require detailed consideration.*

Brief mention will suffice for some exceptional cases, happily of rare occurrence in practice, in which, again, Equity declines to follow the doctrine of law as to the husband's rights in his wife's personalty. It regards that doctrine as having been originally based upon the husband's

* *Infra*, Part III. chap. iii.

liability to maintain his wife; and consequently refuses* to allow him either the capital or the income of her equitable property if he has been released from that liability by her misconduct, or if by deserting her or becoming a bankrupt, he has failed to discharge it. When, indeed, he has so failed, equity will not only exclude him from enjoying the property; but will, if necessary, provide a maintenance out of it for the wife and her children.

The rights of the wife in her equitable choses in action were at one time much impaired by a current doctrine that the mere assignment of them by the husband sufficed (as we have seen was the case at law with negotiable securities) to pass a complete title to the assignee even though they were not reduced into possession before the wife became a widow. But two decisions of Sir T. Plumer's,† though little approved by the lawyers of his time, finally settled that the assignee would obtain no greater right than the husband himself had, and therefore could not retain a reversionary interest of the wife's if her husband died before it fell into possession.

Even the wife's concurrence in the assignment could give it no additional validity; since a Fine could not be levied of personal property, and even Chancery had not provided any other mode of conveyance for her, except in the case of separate estate. The Legislature, however, interfered at this point; and Sir R. Malins' Act‡ of 1857 gives complete effect in most cases to an assignment of the wife's reversionary interests in personalty when effected by herself and her husband in a deed acknowledged.

The various equitable inroads upon the Anglo-Norman rule did not suffice to counterbalance all that the course of time had done to aggravate its pressure. In the simple life of the eleventh century the personalty of even a rich woman might well seem too trivial for any limitation to be imposed on the husband's command of it; and might be contemptu-

* Bright I. 252—265. The same principle is applied in the rents and profits of her equitable *realty*.

† *Hornsby v. Lee* (2 Madd. 16); *Purdew v. Jackson* (1 Russ. 1.)

‡ 20 & 21 Vic. c. 57. *Infra*, p. 138.

ously handed over to his free disposal by impatient shire-motes, instinctively anticipating the principle that "*de minimis non curat lex.*" The whole personalty of a man was of so little value that the forfeiture of it was considered no excessive penalty for the nominal guilt of an accidental homicide.*

But a time soon came in which goods and chattels became more numerous and more precious. Only the *deodand* was forfeited for a death by misadventure. A tenth or a fifteenth of men's personalty became a tax of intolerable amount. Long terms of years were invented, which made the leasehold often as valuable as the fee-simple. This revolution in the relative value of realty and personalty was accompanied by a revolution in the practice of conveyancing, which, for the preservation of family estates, made the fortunes of the female members consist usually of personalty. In the eleventh century most wives would be unconscious that they had lost their personalty. In the nineteenth, in losing it most wives lose their all.

The Married Women's Property Act supplied a partial remedy for the case of women who should be married after its passing; although (unlike the corresponding clause that relates to realty†) it does not protect property which is already theirs at the time of marrying.‡ If personalty devolves upon such a woman during coverture, as her distributive share under an intestacy, the Act directs that it is to be regarded as her separate estate. A further protection, of great value to the lower middle classes, is conferred by a clause impressing the same separate character upon sums under £200 which are given to such a woman during coverture by any deed or will. A rich settlor has both the opportunity and the legal counsel for expressly stamping

* Cf. p. 63, *supra*.

† *Supra*, p. 73.

‡ Sec. 7. Where any woman married after the passing of this Act shall during her marriage become entitled to any personal property as next of kin, or one of the next of kin of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will, such property shall (subject and without prejudice to the trusts of any settlement affecting the same) belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same.

his gift with the character of separate estate. The Act therefore does not supply an omission which he seems to have purposely made; but contents itself with accomplishing the presumable intention of the poor settlors who may have lacked the counsel, and the intestates who lacked the opportunity, to give express utterance to their wishes. The limit of £200 was borrowed by Lord Houghton (to whom we owe this clause) from the old Chancery rule* which refused the wife a settlement out of funds that were beneath that amount. A third species of personalty is also protected by the opening clause of this Act,† which gives every wife, whether married before or after its passing, a separate ownership in any money or property that she earns by her own exertions after her marriage; a protection which Lord Lyttelton in vain endeavoured to extend to pre-nuptial earnings.

* *Infra*, p. 120. † *Supra*, p. 72.

CHAPTER V.

RIGHTS OF WIFE'S CREDITORS.

THE principle of conjugal unity was applied to the choses in action which were due from the woman in the same manner and to the same extent as it was applied to those which were due to her.* During the coverture the wife could as little be sued, as sue, apart from her husband. He must therefore appear in court in either case; and must himself bear the burden of the judgment if he be sued on her liabilities, just as he alone would reap the benefit if he were to sue upon her rights. All the actions, whether springing from contract or from tort, that might have been brought against her at the moment of marriage, may be brought against him (jointly with her) as soon as the marriage has taken place. Taking her rights, he must assume her liabilities.†

But the claims which others had against her, like the claims that she had against them, before marriage, devolve upon him only temporarily. If a judgment has not been recovered on them before the coverture comes to an end, his marital right and his marital liability will then cease together. If she is the survivor, she may again be sued, as she may again sue, alone. If he is the survivor, he can no longer sue or be sued on such claims (though the personalty which has come into his possession through her still remains his); but her administrator or executor must be sued for the outstanding debts, and can alone sue for the outstanding choses in action. In ordinary cases the husband, of course,

* *Supra*, p. 85.

† There is an old legal superstition, which I find to be still firmly believed by some persons, that a man does not become liable for his wife's debts if she marries him *in her shift*. Instances of such marriages sometimes occur in old newspapers. This idea evidently sprang from the feeling that it was in return for the wife's property that the law burdened the husband with her debts; and the consequent inference (a premature anticipation of the Act of 1874) that where he received no assets with her, he would incur no liabilities. Her unclothed appearance would then simply be 'pre-appointed evidence' that she had no assets to give him. Some information on this practice may be found in *Notes and Queries*, First Series, Vols. VI. and VII.

acts as the wife's administrator; but even then, these choses in action which he recovers in administration are the only personal assets against which her creditors can enforce a claim after her death. Against her realty they can, of course, proceed; whether it be in the possession of her heir or of a tenant by the curtesy.

Such were the rules of the common law upon this subject; and by those rules the liabilities of the great majority of married men are still determined.

But the Married Women's Property Act of 1870 provided that no marriage which should take place after its enactment should render the husband "liable for the debts of his wife contracted before the marriage; but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried" (s. 12). This clause may be regarded as the most unfortunate portion of the statute, whose compound character it betrays—an amalgamation of the reforming efforts of the Commons with the cautious corrections of the Lords' Committee. Not merely does it omit all mention of the liability for pre-nuptial torts; but it gives the husband an entire release from the wife's debts, whilst the preceding clauses have deprived him of her property only partially. The pre-nuptial personalty still remains his. Hence it sometimes happened, after 1870, that when a man married a woman possessing large sums of money, the pair would live in luxury upon her fortune and set her former creditors at defiance. She could not be sued, for she had no separate assets; he could not be sued, for the Act had exempted him.

The Legislature found it necessary to undo its work. Accordingly, the "Married Women's Property Act (1870) Amendment Act (1874)" (37 & 38 Vic. c. 50) was passed. This provides that any husband who marries after its enactment may be sued with his wife for her pre-nuptial debts, breaches of contract, and torts; but it limits his liability to the real and personal estate that the wife has brought him, (which a carefully drawn clause analyses into six possible species).

English law thus maintains, and long into the twentieth century will maintain, three discordant rules as to the liability of husbands for the pre-nuptial debts of their wives:

(*a.*) Those married before August 9th, 1870 are under a general personal responsibility.

(*b.*) Those married on or after August 9th, 1870, but before July 30th, 1874, are entirely exempt.

(*c.*) Those married on or after July 30th, 1874, are under a limited liability.

We may now pass to the rights that arise against a husband in consequence of liabilities which his wife incurs after marriage. The rules upon which these depend require to be explained separately from those which we have just discussed, but may, nevertheless, be traced to the same fundamental principle.

After marriage, as before, the wife retains sufficient legal existence to be capable of committing torts; and a tort committed by a married woman accordingly constitutes a good cause of action. Yet as she cannot appear in court alone, the action must be brought against her and her husband jointly, just as in the case of torts which she had committed before marrying him. But as a wife does not possess sufficient legal existence to be capable of making a contract, any bargain into which she enters as principal is simply void and therefore imposes no liability at all upon either herself or her husband. (The exceptional cases in which a wife is permitted to make binding contracts* are due to a practical suspension of the coverture, which leaves her, for the time, no husband who can be sued; and any action on such a contract may therefore be brought against her separately).

Yet though a woman loses by the act of marriage the 'will' necessary for making contracts or dispositions, she may make them as the instrument of another person's will. If it be for her own husband that she is thus acting as agent, very slight evidence will often suffice to prove her authority to bind him; and the judicial decisions upon this subject have considerably enlarged the range of a husband's

* *Infra*, p. 146.

liabilities. Wherever he knows that the goods which have been obtained by the contract are being used by her, and offers no objection, he may be sued upon the contract, even though it was made without his authority; for even this tacit *ratihabitio retrotrahitur, ac priori mandato æquiparatur.** Again, even where he knows neither of the goods nor of the contract, he still may often be sued for them if they were 'necessaries' required for herself or for the family;† for the ordinary habits of domestic life render the mere fact of cohabitation sufficient *primâ facie* evidence that the husband intends the wife to order the household supplies.

There remains a third class of cases in which he is held liable for such necessaries, however complete may be the proof that he never intended her to order them; for if he wrongfully turn her away, or if he even neglect to provide her with necessaries whilst she is living with him, the law clothes her with authority to obtain them by pledging his credit. In such cases, however, it seems a needless complication to introduce (as do some of the older decisions) a fiction of her being his agent, for the sake of assimilating them to cases of the two previous kinds. It is simpler to treat them on a different ground, and consider the husband's liability as arising not from a contract made through an agent, but from a quasi-contract.

In all three instances the liability is the husband's own in its very origin, and he is therefore to be sued alone without joining his wife; though he cannot be sued alone where it is in an act of her 'will' that the liability has originated, as in the case of contracts that she made before marriage, or of torts that she has committed either before or after it.

Where the cohabitation has come to an end by the wife's voluntarily quitting the husband, whether spontaneously or by mutual agreement, and there has been no sufficient misconduct on his part to justify the separation, he will not be liable for any debts she may thenceforward contract, even for necessaries. This rule was first established in 1663, in the elaborately debated and fully reported case of *Manby v. Scott*, in which the whole of the judges and barons were

* Y. B. 20 H. 6, 21 b.; 27 H. 8, 25 a. † Y. B. 11 H. 6, 30 b.

consulted.* Such a wife, nevertheless, still remains incapable of making contracts on her own account; and thus goes forth into the world with little chance of obtaining necessaries for her support. To the two judges, who dissented from the decision of the majority in the case just quoted, it appeared incredible that the laws of England should thus permit a wife, "que est lour darling, destre separate et starved per hunger et cold."†

* Siderfin 109—130. See also 1 Mod. 124; 1 Lev. 4; 1 Keble 69; and Bacon's Abridgment, where Hale's argument seems to be given from an original source.

† Cf. *infra*, p. 148.

PART III.

CONJUGAL PROPERTY.—RIGHTS ORIGINATED BY THE COURT OF CHANCERY.

CHAPTER I.

THE WIFE'S SEPARATE ESTATE.

By the Court of Chancery, in its earlier days, the doctrine of conjugal unity was accepted as thoroughly as by the Common Law Courts. That Equity should have 'followed the law' on this subject is the more surprising when we remember that the opposite doctrine was not only that of the Corpus Juris, but had actually been adopted by the ecclesiastical courts of England. There, the clerical Chancellors must have become familiar with the spectacle of wives suing and being sued without the intervention of a husband.

But it appears to have been by the direct influence of the common law judges that Chancery was originally led to adopt this doctrine, and was long afterwards induced to adhere to it. Of that influence we shall find remarkable evidence in the cases which established the wife's incapacity to alienate even her equitable property.*

In 1581, however, a case was decided which paved the way for the establishment of a widely different system. Where† a man had agreed to separate from his wife, and funds for

* *Infra*, p. 136.

† Cary, 124. "The Plaintant setteth forth in her Bill that she joined with her husband in sale of part of her inheritance; and after, some discord growing between them they separate themselves; and £100 of the money received upon sale of the lands was allotted to the Plaintant for her maintenance, and put into the hands of Nicholas Mine, Esq., and bonds then given for the payment thereof unto Henry Golding, Esq., deceased, to the use of the Plaintant. Which bonds are come to the Defendant as administrator of the said Henry Golding deceased, who refuseth to deliver the same to the Plaintant; and hereupon she prayeth relief. The Defendant doth demur in law because the Plaintant sueth without her husband. And it is ordered the Defendant shall answer directly. *Mary Sanky* alias *Walgrave*, plaintant: *Golding*, defendant. Anno 21 & 22 Eliz."

her maintenance had consequently been vested in a trustee, she was recognised as being thereby clothed with authority to enforce the due application of those funds without the husband's intervention.*

The principle of separate estate, thus initiated, seems soon to have been applied generally, whenever property had been vested in a trustee with a view to the personal maintenance of a married woman, even though she were still cohabiting with her husband. Cases of this kind are reported in 1624 and 1638.† Thus, before the end of Charles I.'s reign it had "become no uncommon thing for a wife to have separate property, independent of her husband."‡ The Chancery reports of that early period are so meagre as to render valuable the information afforded by a legal Opinion, of the date of 1635, which I find preserved among the MSS. of the University library at Cambridge, and which shows how bold a doctrine of separate estate was already current at the bar, if not upon the bench.§ The writer

* Similarly in 1639 (Tothill, 161) :—"*Georges v. Chancie*, a *Feme Covert*, being separated, having an allowance of £200 she improved it, and disposed of it by her Will. *Mich.* 15 *Car.*" More fully in Ch. Rep. 125 as *Gorge v. Chansey*.

† "*Fleshward v. Jackson*. Money given to a Feme Covert for her maintenance, because her Husband is an unthrift, the Husband pretends the money to be his, but the Court ordered that the money should be at her disposing. 21 Jac.' (Tothill, ~~158~~.) 94 , 21 E. R. 133

"*Poole v. Harrington*. A Wife hath a stock for her own use, and dies, who is buried by a friend without direction of her Husband; he that buries her must be at the charge, and not the husband. *Mich.* 14 *Car.*" (Tothill, 161.)

‡ Spence's *Equitable Jurisdiction*, I. 596.

§ This opinion, and the case (both anonymous), are copied into a note-book, which is among the Patrick Papers (vol. 23, p. 34). The case runs thus :— "A B being seised of landes in socage graunted the same by his deed inrolled unto C D and E F, their heyres and assignes, Habendum to the use of Mary the wife of John a Stiles, her heyres and assigns for ever. The said Mary, having by the body of John a Stiles, one sonne and three daughters, doth by her deed, and also by her Will in writing, (without the consent of John a Stiles her husband) give all the said lands unto her three daughters, tying them to pay her sonne £200. And afterwards the said Mary dieth, her said husband John of Stiles surviving and renouncing all assent to her said deed or will, and claymeth the said lands to bee due to him for his life, and after to the said sonne. And now John a Stiles also is dead. *Quære*, whether the estate of these lands by law is belonging to the three daughters, or the sonne and heyre of John a Stiles and Mary, or to C D and E F, or to which of them; or whether, if the two feoffees, C D and E F, making such estate of the lands as she limitts by her said will in writing shall bind all the rest or not?"

advises his client that, "A woman that hath a husband cannot devise landes by the statute of 32 H. 8. But if landes bee settled in others in trust for her use and to be at her disposing, then shee may dispose as shee will in equity, and in Chancery the trustees must execute the estate according to the disposition. 21 December, 1635."

But though in such cases the wife was thus permitted to institute a suit *without* the husband, some time elapsed before she was allowed to institute one *against* him. The cases, however, proved to be very frequent in which pre-nuptial settlements had been made without interposing any trustee, and had transferred no *jus in rem*, but had consisted merely of a contract by the husband with the intended wife, whether it were to pay her during coverture a given sum of money for her separate enjoyment, or to leave her at his death a given share of his estate. In the latter case, it was established that even at Common Law, the contract was not extinguished by the marriage; since it was one which could not possibly be performed during coverture.* But in the former case, the *jus in personam*, or chose in action, thus acquired by the intended bride was at law re-vested in the husband the moment the marriage took place; and all her right to the stipulated provision was thus brought to an end. In 1631 the Lord Keeper, in a fully reported judgment,† declared that even in equity the coverture would similarly extinguish such agreements, which he pronounced to be "in subversion of the grounds of law and of the rights of marriage." In 1663 the same rule was again laid down, in deference to this authority.‡

Here, again, it seems to have been in cases where the conjugal life had been practically broken up by a separation deed, that the power to sue was first conceded to the wife; and in 1639 the Court recognised this exception, whilst refusing to go beyond it.§ But within a very few years after

* *Smith v. Stafford* (Hob. 216), by three judges against one; *Clarke v. Thompson* (Cro. Jac. 571), unanimously, A.D. 1620.

† 2 Freeman, 146. ‡ 2 Freeman, 148.

§ *Roe v. Lord Newburgh.* "A Feme Covert cannot sue, unless there be a severance. This suit is for a promise in" [*i.e.*, in view of] "marriage, after twenty years. The matter was dismissed because the Plaintiff could not find Presidents suiting this case. In *Trin.* 15 *Car.*" (Tothill, 161; see 160.)

the case of 1663, Chancery consented to interpose its aid for the enforcement of all such contracts; and permitted the wife (by her "next friend") to file a bill for her separate estate even against her husband. In 1679 it was decided that a pre-nuptial contract between husband and wife for a settlement, was not released by the marriage; and his heir (after his death) was ordered to carry out the contract.* In 1686† a man who had promised his intended wife that she "should have power to dispose, notwithstanding the marriage," of a particular debt that was due to her from a third person, was compelled, after the marriage, to permit her to do so. Similarly, in 1695, we find Lord Somers decreeing that a man who had given a bond to his intended wife, which their subsequent marriage rendered void, should in lieu of it make one to trustees for her benefit.‡ In 1712 this was extended so far as to enforce a gift which the husband (without interposing a Trustee) had made to the wife *after* their marriage; reversing the policy which England had borrowed from Rome five hundred years previously.§

In all the cases that had been decided before Anne's reign, the settlor had taken the precaution of placing the separate estate in the hands of a trustee. But in 1710 Lord Cowper was called upon to consider the effect of a will by which a direct bequest had been made to a married woman, of personalty which she was to hold to her separate use. What decision was given we are not told‖, but the Chancellor expressed grave doubts whether a husband, on becoming thus entitled at law, could be restrained in equity from exercising his ownership. In 1722 an express decision to this effect was given by Lord Macclesfield, rejecting a widow's claim for "twenty-five guinea purses,¶ being her dowry money," on the ground that they could not be

* *Haymer v. Haymer.* (2 Ventris 343.)

† *Fursor v. Penton.* (1 Vernon 409.) ‡ 2 Freeman, 205.

§ *Supra* p. 46. *Mitchell v. Mitchell,* Bunbury 207. Their *post*-nuptial contract was held valid in 1725, (*More v. Ellis,* Bunbury 205); contrast Ch. Rep. 60.

‖ Though the case (*Harvey v. Harvey*) is twice reported, 1 P. Wms. 125; 2 Vern. 659. ¶ May we read "twenty *five-guinea pieces?*"

separate estate, since they had been "given to herself, and not to her trustee, and the wife cannot have a separate property in a personal thing, without a trustee."*

But a bolder doctrine, which has ever since prevailed, was laid down three years afterwards by Sir Joseph Jekyl, M.R. This case was stronger than Lord Cowper's, since it was a devise of land directly to the wife (with a declaration of separate use). Such a devise gives the husband a legal interest at once; whereas a bequest of personalty interposes the executor as a temporary trustee, and thereby entitles the Court to impose terms on any assistance which it affords the husband against him. This argument was pressed; and it was urged that the husband could not be trustee for the wife as they were both one person, nor could she be trustee for herself. But Sir Joseph Jekyl pronounced it a clear case; and ruled that, "There being an express declaration that the wife should enjoy these lands to her separate use, by that means the husband (who would otherwise be entitled to take the profits in his own right during the coverture) is now debarred and made a trustee for his wife. . . When the testator had power to devise the premises to trustees, for the separate use of the wife, this Court, in compliance with his declared intention, will supply the want of them, and make the husband trustee."†

A little more than a century thus sufficed to establish a species of property entirely emancipated from that theory of conjugal life which had been originally accepted in its most absolute form by both Common Law and Chancery. In the six generations that have since elapsed, the principles thus established have been worked out into an elaborate system of rules; but only one important doctrine (established by Thurlow) has been added to their number since the Chancellorship of Somers.

The original object of the doctrine of Separate Estate—instituted, as it at first was, for cases where the conjugal

* *Burton v. Pierrepoint*, (2 P. Wms, 79). See note on p. 39 *supra*.

† *Bennet v. Davis*, (2 P. Wms. 316). A.D. 1725. He added that though the husband "might be tenant by the curtesy, yet he should be a trustee for the heirs of the wife." This question we have already discussed.

home was broken up—had been to protect the wife against the legal power of the husband. But experience soon showed that in the majority of cases the practical effect of the doctrine was to increase his power. The "separate estate" was not indeed at his disposal, but the wife was, ultimately, allowed to alienate it as freely as if she were unmarried. Wherever, therefore, the marriage was sufficiently happy to render her amenable to his advice in business matters, the separate estate lay at his control, without fear of either the expense or the supervision that a Fine would have involved. Hence it was found in practice that when the wife alienated or charged it, it was almost always for the husband's purposes. He had "kissed or kicked" it from her.

To guard against this peril, and against the rights which the Court was gradually conceding to the wife's creditors, it became common, towards the end of the eighteenth century, for settlors to add to their gifts of separate estate a clause prohibiting alienation. Such clauses were not invented until "many years after I entered the profession," says Lord Eldon;* who had been called to the bar in 1776. Their validity was at first denied by the general opinion of lawyers.† English jurisprudence had long been accustomed to regard every right of present enjoyment as inseparably accompanied by a right of alienation. A species of property had been created which a wife might enjoy, might administer, and might sue for; and to withhold from her the power to dispose of it would be an unprecedented anomaly. But such, too, it might reasonably be replied, was this separate property itself; and the second anomaly would not be an exaggeration of the original one, but rather a step in return to the normal principles of our law. What equity had power to do, it surely had power to do in part. The evident leaning of Lord Thurlow served to keep the clause in favour amongst conveyancers. In 1791, when decreeing in favour of the alienation which a wife had made of her separate estate, he added, *obiter*, "If it were the intention of a parent to give a provision to a child in such a manner that she could not alienate it, *I see no objection to its being done;*

* 2 Merivale 487 † Sugden on Powers, I. 201, ed. 1845.

but such an intention must be expressed in clear terms."* (When a marriage settlement was being drawn in which he himself was to undertake the duties of a Trustee, he urged the insertion of such a clause against anticipation.)† His view was almost immediately adopted by Lord Alvanley‡ (A.D. 1793). "And so it has been considered ever since," said Lord Eldon, twenty-four years afterwards; "it is too late now to contend against the validity of the clause."§

It soon became the invariable practice of the Court of Chancery to insert these restraining clauses in all settlements that were made under its authority upon wards of Court.

This unique disability was carefully limited by the Court to the purpose for which it was created. Sir Wm. Grant decided in 1815 || that on the moment of the coverture's ceasing, the woman regained her full powers of alienation; and a similar decision was independently given in 1822, by Sir T. Plumer, M.R.¶ (Sir John Leach afterwards decided to the contrary, but was overruled by Lord Brougham.)** If the settlor desires to restrain her from disposing of the property during her widowhood, he can only do so, as in the case of a male *cestui que use*,†† by adding a gift over to some third person in the event of her making any attempt to dispose of it.

So seriously, however did this new restraint operate upon the position of the married pair, that there arose a doubt, (and a similar one was raised about the separate estate itself) whether it could be permitted to interfere with the rights of any husband who was not actually married, or at least negotiating to be married, to the lady at the time when the restraint was imposed. Though such prospective clauses

* *Pybus v. Smith* (3 Bro. C. C. 347).

† 11 Vesey 221. In 9 Vesey 493, it is said that he urged it, in hopes "to take the case out of Lord Hardwicke's doctrine;" the allusion doubtless being to *Peacock v Monk* (*infra* p. 108).

‡ *Sockett v. Wray* (4 Bro. C. C. 483), A.D. 1793.

§ *Jackson v. Hobhouse* (2 Mer. 483) A.D. 1817.

|| *Jones v. Salter*, 2 Russell and Mylne 208; (not reported till then).

¶ *Barton v. Briscoe*, (Jacob, 603).

** *Woodmeston v. Walker*, (2 Russell and Mylne, 197).

†† *Brandon v. Robinson*, (18 Vesey 429; 1 Rose 197).

were habitually inserted by conveyancers, the Courts seemed at first to doubt their validity. Even the plasticity of equitable interests, it was urged, would not permit an estate to commence by being fully alienable, and then to fall under a fetter of this desultory and shifting kind. To this view Lord Brougham evidently inclined, when a case was appealed against, in which Sir John Leach had regarded these prospective restraints not only as valid, but as restrictive even whilst the woman was still unmarried.* In the case of *Massey v. Parker*† Lord Cottenham, then at the Rolls, also confirmed this view. But in *Tullett v. Armstrong*, Lord Langdale expressed a contrary opinion, and this, Lord Cottenham,‡ on an appeal to him, finally adopted after elaborate discussion. The validity of the prohibition, even when prospectively and contingently erected, was thus placed beyond the reach of doubt. Nothing but this prohibition against anticipation—so that great judge declared that his experience had convinced him—"prevents separate estate from being in many cases an evil rather than a benefit to the wife."§

A serious inroad upon the efficacy of the Separate Use is said to have been made in 1680, in Sir Edward Turner's case; when the House of Peers, in the absence of the law lords, was induced by the judges to reverse a decree made by no less a master of equity than Lord Nottingham. So meagre and ambiguous are the only notices which we possess of this case, that it is to this day a matter of doubt what the point involved in it really was. Mr. Macqueen is of opinion that the common-law judges persuaded the House "that a settlement to the separate use of a married woman was good only when made with the privity and by the consent of the husband;" and that this principle was accordingly followed by the Court of Chancery in reported cases of 1681 and 1692. Had this doctrine been permanently adopted by the Court, a husband might have disposed of his wife's separate estate whenever he had not been made a

* *Woodmeston* v. *Walker* (2 Russell and Mylne 197.) Cf. 4 Simon, 141; 5 Simon, 663.

† 2 Mylne and Keen, 174. ‡ 4 Mylne and Craig, 377. § Ibid, p. 399.

party to the creation of it, and the protection that Chancery had provided for wives would have become futile in the cases where it was most needed. An opposite doctrine, however, had long been adopted by the Chancellors; and their successors of the eighteenth century resumed it in spite of this (alleged) temporary relapse,* and entertained no doubt that the husband's rights might be ousted by a separate use created in spite of his protest.

In the present century, doubts began to be expressed from the Bench whether a husband was to be excluded from the enjoyment of property which had been given to 'the separate use' of his wife *before* she married him, if no settlement of it was made at the time of marriage.† Whilst still single she had full power to dispose of the property and the very act of marrying him without a settlement amounted, it was urged, to a disposition in his favour. The character of separate estate might, indeed, be impressed upon property that was given to a woman whilst actually under coverture; but could not be permitted to hang as an inchoate and contingent qualification over property given to a woman who was still *sui juris*. Upon this question the fluctuation of judicial opinion was so great as to lead Lord Cottenham (in 1834, whilst still at the Rolls) to lay down in *Massey v. Parker*‡ that a gift to a woman's separate use would not exclude the rights of her after-taken husband. This decision "created great alarm in the profession, and particularly amongst conveyancers, whose practice had from time immemorial been to limit property to the separate use of a woman, without reference to the circumstance of her being at the time single or under coverture."§ Moreover this judgment, as we have already seen, laid down equally unwelcome views about Restraints on Anticipation. When

* The learned remarks of Mr. Macqueen (*Law of Husband and Wife*, 2nd ed., pp. 91—100) must, however, be read in connection with those of Mr. Bright (I. 99), and with the note which he cites from 4 Mylne v. Craig, 390; which render it doubtful whether either *Sir Edward Turner's Case* or *Tudor v. Samyne* involved the question of separate estate at all. See also Lord Cottenham's remarks upon these cases in *Tullett v. Armstrong*.

† See too, *Beable v. Dodd* (1 T. R. 193). ‡ 2 Mylne and Keen 174.

§ Arg. *Scarborough v. Borman* (4 Mylne and Craig 385).

its author soon afterwards received the Great Seal, it became important to ascertain if these novel doctrines, that neither restraint nor estate could be 'ambulatory,' were to become the jurisprudence of the head of the Court of Chancery. In 1840 an opportunity presented itself. Both points were involved in the case of *Tullett v. Armstrong*, which came before Lord Langdale,* who had succeeded to the Rolls; and on both, he laid down a doctrine opposed to that of his predecessor. An appeal, as we have seen, followed;† but, after an exhaustive argument, Lord Cottenham frankly and gracefully accepted the positions of Lord Langdale, thus (as he said) "doing what is in me to dissipate the alarm which has prevailed lest the separate estate should be held not to exist at all during subsequent coverture, or lest—which would in many cases be a greater evil—it should exist without the protection of a clause against anticipation." Yet he regarded this permission to create separate estate *prospectively*, as a third 'violation of the laws of property,' worthy to be ranked with the original creation of the Separate Use itself, or of the Restraint on Anticipation.

We have seen that, even as early as 1635, the separate estate was popularly regarded as being at the disposal of the wife. We may now inquire by what stages this doctrine obtained the full judicial recognition which it now enjoys. As far back as 1639 it had been decided that a wife could bequeath the accumulations she had made from the income of her separate estate whilst living apart from her husband.‡ As the doctrine of separate use gathered strength, the power of disposition grew with it. Settlors were permitted to confer upon women who were living with their husbands a right to dispose, in the case of personalty, of even the capital fund itself; and professional opinion came to recognise that right as an implied incident of the estate itself. Thus, in 1751, we find Lord Hardwicke§ stating as a

* 1 Beavan 1. The present point was also raised before him in *Scarborough v. Borman*, (1 Beavan 34), and both cases were argued in connection, both at the Rolls, and on appeal.

† 4 Mylne and Craig 377. ‡ *Georges v. Chancie* (Tothill 161). *Supra*, p. 100.

§ *Peacock v. Monk* (2 Ves. Sen. 191).

familiarly accepted doctrine that "Where there is an agreement between husband and wife before marriage, that the wife shall have to her separate use either the whole or particular parts [of her personalty], she may dispose of it by an act in her life or by will (she may do it by *either*, though nothing is said of the manner of disposing of it)." But if the husband had made no such agreement, and the estate had been given her by a third person, would she then have the power of thus ousting her husband's rights of succession without his consent? In 1789, Lord Thurlow decided that she might do so, and even when the settlement under which she took the money was silent on the subject; and might do it even by Will.* It had always, he said, been his view that a wife who received personalty as separate estate received it with all the incidents of ownership, and therefore with the right of alienation.

But these doctrines, which no doubt had long prevailed amongst conveyancers, were for a time qualified by two decisions of Lord Rosslyn. In 1798 he refused to allow a wife to dispose of her separate estate in favour of her husband;† and in 1800, forbade her to create an annuity out of it even in favour of a stranger.‡ Both powers, however, were soon afterwards conceded to her. The former, in 1805, by Lord Eldon; who, discarding the ancient jealousy of both common and civil law towards gifts between husband and wife, declared, "If he conducts himself well, I do not know that she can make a more worthy disposition," and added that in Thurlow's time there had been no doubt amongst Chancery lawyers that such gifts might be made to a husband.‖ The latter, in 1808, by Sir Wm. Grant;§ who also permitted the wife to sell even a reversionary interest in personalty, when settled to her separate use.¶

* *Fettiplace v. Gorges* (1 Ves. Jun. 46).

† *Whistler v. Newman* (4 Vesey 129). Here Lord Rosslyn said, "The cases have certainly gone this length (and I am bound by those decisions), that if a married woman has separate property, she may dispose of it; and the trustees are bound to follow her disposition. *One cannot but regret it; but I do not know how to help it.*"

‡ *Mores v. Huish* (5 Vesey 692). ‖ *Parkes v. White* (11 Ves. 222).

§ *Essex v. Atkins* (14 Ves. 542). ¶ *Sturyis v. Corp* (13 Ves. 190). A.D. 1806.

Where, however, the separate estate consisted not of personal but of real property, it remained to our own day a matter of doubt whether the wife could devise it by her will, or could convey the inheritance without a Fine (or deed acknowledged), if no express power to do so had been conferred on her by the settlement. Such dispositions would affect not merely the rights of the husband, but also those of the heir; yet the object of the settlor in creating the separate use was, it was urged, only to protect her against the husband.* Lord Westbury, by an elaborate judgment in 1865, established that every gift of separate estate, whether real or personal, to which no clause against anticipation is appended, confers upon the wife as an inherent incident the same full power of alienation, both *inter vivos* and by will, that she would possess if unmarried.†

From permitting the wife to dispose of her separate estate by means not indicated in the settlement, the transition must have been easy, even in the seventeenth century, to permitting her to charge it in favour of a creditor. This was at last even considered to be effectually done in many instances by mere implication; without any express mention of the separate estate being made in the instrument by which the debt was contracted. Hence in 1751 Lord Hardwicke said, *obiter*, "If a wife borrows money which she gives a bond under hand to pay, this would give a foundation to demand the money against her out of her separate estate."‡ This remark, which probably embodied the current professional opinion of George II.'s time, was authoritatively adopted by Lord Thurlow. In 1778, in the great case of *Hulme v. Tenant*,§ he established the principle that the liability of the separate estate depends on the intention wherewith, and not on the wording of the instrument whereby, the debt is contracted; and, accordingly, he charged the personalty, and the produce of the realty, with the payment of a bond

* See Lord Romilly's remarks in *Harris v. Mott* (14 Beavan 170); and see 32 Beavan 353.

† *Taylor v. Meads* (4 De G. J. and S. 597).

‡ *Peacock v. Monk* (2 Ves. Sen. 191). § 1 Brown C.C. 17.

executed by the wife, though it contained no words referring to her separate estate. This important decision was repeatedly doubted by Lord Eldon; but he never actually decided against it, and it has always been followed by his successors. Sir Wm. Grant similarly, in 1810, charged the rents of the wife's separate realty with the amount for which she had given a promissory note.* All her *pre*-nuptial debts were also admitted as charges on the estate.**

But was every contract of hers to be permitted to create a hold on the separate estate, even when it was contracted 'generally,' that is to say, without any special mention being made of either the property or the power, of either the separate estate or the settlement? Lord Rosslyn† refused to carry this doctrine to the extent of recognising every mere 'general' personal engagement as creating any hold on the separate estate; and so did Lord Eldon.‡

Nevertheless, it was at last established that all her *written* contracts, however 'general,' would bind the separate property. But then, it was argued, they operate not as contracts, but as actual dispositions of her estate. If so, since equitable estates can only be disposed of in signed writing, her merely *verbal* contracts will be void. From this argument, however, Lord Brougham dissented; and expressed, *obiter*, the opinion that any contract of the wife's, though not only merely 'general,' but not even expressed in writing, would suffice to bind the separate estate.§ Lord Cottenham took the same view, insisting that the debts must not be regarded as actual dispositions, for, in that case, the creditors, like other appointees, would have to take successively to one another in order of time. ‖

Successive decisions, during the next generation, served only to increase the darkness in which this question was involved. But a judgment which Lord Justice Turner

* *Bullpin v. Clarke* (17 Ves. 365). ** *Biscoe v. Kennedy* (1 B. C. C. 17).

† *Duke of Bolton v. Williams* (2 Ves. Jun. 138). A.D. 1793.

‡ *Jones v. Harris* (9 Ves. 486). A.D. 1804.

§ *Murray v. Barlee* (3 Mylne and Keen 209). A.D. 1834.

‖ *Owens v. Dickenson* (Craig and Phillips 48) A.D. 1840; *Lord v. Wightwick* (2 Phillips 110) A.D. 1846.

delivered in 1861* (though expressing views in which his colleague Lord Justice Knight Bruce did not concur, which Lord St. Leonards is rumoured to have disapproved, and which Lord Romilly† subsequently attempted to overrule) has recently been recognised both by the Court of Appeal‡ and the Privy Council§ as an authoritative statement of the doctrine. In it he laid down that "Not only the bonds, bills, and promissory notes of married women, but also their 'general engagements' may affect their separate estate (except as the Statute of Frauds may interfere where the separate property is real estate)." But he is careful to explain that by 'general engagements' he means something more than the mere contract which would suffice to bind a single woman. But "what that something more may be must depend in each case upon the circumstances." Those circumstances must be such as to show "that the engagement was made with reference to, and upon the faith or credit of, that estate." In the case before him he thought that the fact of the contract having been made when the wife was living separately from the husband, was sufficient to "preclude the inference that she expected her husband to pay," and therefore sufficient to show that she meant to deal with her separate estate. Thus the separate property is now liable for all debts that are contracted in writing; and even for those that are contracted verbally, if it appears that, in the words of the Privy Council, "the woman intended to contract so as to make herself—that is to say, her separate property—

* *Johnson v. Gallagher* (3 D. F. and J. 494.)

† *Shattock v. Shattock* (L. R., 2 Eq. 182). A.D. 1866.

‡ *Picard v. Hine* (L. R., 5 Ch. App. 277). A.D. 1869.

§ *L. C. Bank of Australia v. Lempriere* (L. R., 4 P. C. 572). A.D. 1873. In this case the Court says, "The term 'general engagement' is an ambiguous and misleading one. If it is meant merely to say that goods sold to a married woman in the ordinary course of domestic life, that contracts expressed to be made by her in respect of property not her separate estate (*e.g.*, for buying or selling, or letting or hiring a house), do not necessarily impose a liability to be satisfied out of the separate estate which she may happen to have; in that sense and to that extent, the proposition that her separate estate is not liable to her general engagements is quite accurate. But that does not affect the rule as laid down by Lord Justice Turner, as to those general engagements which . . . were made with reference to and upon the faith or credit of the separate estate."

the debtor."* It may be conjectured that very slight circumstances will be held sufficient to evidence that intention, until, before long, every debt will of itself bind the separate estate. It may still more confidently be conjectured that when the point arises for decision, the old distinction between the realty and the rents will be abandoned; and the whole separate property, real as well as personal, corpus as well as produce, will be rendered liable for the debts. The form of decree employed in recent cases makes no distinctions, but declares chargeable all property vested either in the wife herself, or in any other person or persons for her separate use.†

Long after the final establishment of the rules both of separate estate and of restraints on anticipation (and indeed into the present reign), a salient memorial of those serious doubts which had surrounded the development of both doctrines, was preserved in the extraordinary prolixity of the language which conveyancers used in applying either of them, as if still feeling actuated by "a more than common anxiety explicitly to declare the intention of the parties."‡

From the review which I have now given of the rise and progress of the equitable doctrine of Separate Estate, it will be seen that only by an express disposition, only by an act of the parties, did Chancery ever permit a wife's property to be stamped with this separate character. The Legislature, however, as we have already said, has carried the principle further; causing the property which a wife acquires in certain specified ways, to become separate estate at once, by mere act of law. The Married Woman's Property Act of

* L. R., 4 P. C. 596. No express decision has been given as to the efficacy of a merely verbal contract; but the sweeping language of all the recent judgments ignores the distinction. Even in *Shattock v. Shattock* Lord Romilly admitted that "the engagement need not be in writing." We therefore may fairly, with Vice-Chancellor Kindersley, "think it probable that when this question (of verbal engagements) arises for decision, it will be decided in the affirmative." *Vaughan v. Vanderstegen*, A.D. 1854, (2 Drew, 183.)

† *Picard v. Hine; Davis v. Jenkins* (L. R. 6 Ch. D. 730).

‡ Jarman's *Conveyancing* (ed. 1840) 1V. 94 n.

1870, by which this new rule was laid down, applies it to the following cases:—

(*a*) Earnings of any married woman.*

(*b*) Personalty accruing by intestacy to a woman married after the Act.†

(*c*) Sums under £200 settled on a woman married after after the Act.†

(*d*) Rents and profits of realty inherited by a woman married after the Act.‡

The ownership which the wife acquires in these four species of property is, as in ordinary separate estate, a purely equitable ownership. The husband's rights in the legal estate remain unaffected; and it is the equitable estate alone that she can charge or alien.§ One remarkable difference does, however, exist between the old separate estate of Chancery, and this "Statutory Separate Estate" (if I may coin a convenient phrase). In the former, the wife had only an equitable right, and therefore, naturally, only an equitable remedy. But in the latter the Legislature has taken the remarkable course of clothing her purely equitable ownership with both equitable and legal remedies. The Act of 1870 provides (s. 11) that:—

"A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, (or of any property belonging to her before marriage, which her husband shall by writing under his hand have agreed with her shall belong to her after marriage as her separate property), and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property."

It is to be regretted that a similar direct remedy has not been given to the creditors of a wife who possesses such

* 33 & 34 Vic., c. 93, s. 1. *Supra*, p. 72.

† Sec. 7. *Supra*, p. 92. ‡ Sec. 8. *Supra*, p. 73.

§ So much popular misapprehension seems to exist on this subject, that I would here refer to the lucid judgment of Sir George Jessel in *Howard v. Bank of England* (L. R., 19 Eq., 297).

property; but the clause only permits her to sue, and not to be sued. Hence the newspapers have recently familiarized us with the spectacle of a popular actress, who whilst living apart from her husband, and receiving a large professional income, can yet keep the whole of that income out of the reach of her creditors, and successfully oppose the plea of coverture to the claims of her grocer, her butcher, and her landlord.*

This remarkable power of suing during coverture, it wil be noticed, is not confined to the statutory separate estate; it is to extend even to ordinary equitable separate estate, whenever that consists of property which was hers before marriage, and which has been rendered separate estate by the husband's written consent. But the Act contains a further privilege in matters of procedure, which extends to the statutory separate estate only. The ninth section permits any dispute which arises between a wife *and her husband*, about such estate, to be determined in summary manner by the Chancery Division, or even (whatever may be the amount of property involved) by the judge of the local County Court.

But it is not only in the various proceedings which the Act of 1870 thus allows a wife to initiate, that she can now sue without her husband and even without the formality of a next friend. The rules under the Judicature Act of 1873 whilst permitting married women to sue, in all Divisions of the Court, by their next friends, in the manner previously practised in the Court of Chancery; also provide that *by leave of the Court or of* a Judge, they may sue or defend without their husbands or without a next friend, on giving such security (if any) for costs as the Court or a Judge may require.†

* The decision in Mrs. Rousby's case followed the ruling in the case of a professional sister, Madame Lablache, which is reported L. R., 3 C. P. D. 197.

† Rule 15 ; Order XVI., Rule 8, under the Judicature Act of 1875.

CHAPTER II.

PIN MONEY.

DURING the latter half of the century in which the Separate Use was growing into a general doctrine, another device appears to have been introduced to favour the separate individuality of the wife. The practice of stipulating with an intended bridegroom for a periodical allowance of "Pinmoney" to his wife, for disbursement on her personal expenses, appears to have been unknown in this country until about the time of the Restoration. Addison, in 1712, describes it as "of very late date, unknown to our great-grandmothers, and not yet received by many of our modern ladies." It may perhaps be of French origin, for in the phraseology of the provincial *Coutumes* "les épingles" was the name applied to the presents or money which purchasers of land gave to the wives of vendors, to secure their concurrence in their husband's conveyances.* To these two references which I owe to an anonymous antiquary,† I may add a passage in Selden which seems to show that the phrase was familiar in England before the Restoration; although the practice of making formal legal provision for such an allowance may not have begun so early. For Selden, in a book published in 1646, speaks of a silver coin which Jewish husbands were bound by Rabbinical law to furnish to their wives once every week "ob rerum minutias; ut nos dicimus, *to buy pinnes*."‡

The rapid development of the system of Separate Estate served to prevent Pinmoney from rising into much importance; and the tendency of the more recent cases has been to reduce even the value that it had. By Lord Hardwicke's time it had been settled that Pinmoney was intended not as

* Such presents are still given in Scotland, and are called by Scottish lawyers "The lady's gown." Bell's *Principles*, par. 1560.

† A correspondent quoted by Lord St. Leonards in his "Treatise of the Law of Property," pp. 165—168. The passage of Addison occurs in the 295th *Spectator*.

‡ Uxor Ebraica, p. 342.

property, but only for actual disbursement upon its appropriate objects; and consequently that a wife who survived her husband could not claim more than a twelvemonths' arrears, whilst if she died in his lifetime all claim for arrears died with her. It has since been held, as a further consequence of the same principle, that the savings of Pinmoney and the articles which are purchased with it, belong to the husband even in Equity; though in Lord Hardwicke's time they were regarded, like the similar produce of separate estate, as being at her own disposal.*

How little practical importance Pinmoney now possesses, is sufficiently shown by the vagueness which to this day surrounds the very definition of its nature, and renders uncertain the limits that distinguish it from Separate Estate; a vagueness rendered conspicuous by the hostile criticisms of Lord St. Leonards upon the judgment that Lord Brougham delivered in the last great case in which this subject was discussed.†

* Jarman on Wills, I. 35.

† Howard *v.* Lord Digby (2 Cl. and Fin. 634); regarding the pinmoney of the Duchess of Norfolk. See Sugden's Prop. Ho. Lo. 162—170.

CHAPTER III.

THE WIFE'S EQUITY TO A SETTLEMENT.

WE have seen* that the earlier Chancellors, even down to the time at which they instituted the Separate Use, had afforded the wife no new provision out of her personal property, but were willing to leave the equitable rights of the husband to be governed by the full analogy of Common Law. The court was content to leave him *in statu quo*; it would not interfere with him in realising his wife's riches, or impress upon them any constructive separate trust. But suppose that the husband himself forced the matter upon the court? Suppose he were not content with peaceful negotiations or with the ordinary legal remedies afforded by the judges of the land, but applied to the King's conscience for an extraordinary intervention on his behalf? In such a case the Court might impose its own terms upon the applicant; nay, must do so, to be faithful to its immemorial principle that "He who seeks Equity, must do Equity." Would it not, then, be fairly within the limits of equitable obligation to call upon him to recognise the claims of the woman whose wealth he was seeking to make his own; and to place part of it at her separate disposal, now that such separate ownership had become permissible?

This step was taken. The *Wife's equity to a settlement* was established. Henceforth every husband who came to the Great Seal to ask for the possession of his wife's equitable personalty, must content himself with obtaining only part of his claim, if she stood in need of a provision. At what date, or by what Chancellor, this great principle was initiated, is a question which we must ask in vain. "I do not find the time" said Lord Cottenham, "at which the Court did not exercise this jurisdiction in favour of the wife."† But, it

* *Supra*, p. 89.

† *Sturgis v. Champneys*, (5 Mylne and Craig, 103.) So far back as 1733, Lord King said, "I found it at my coming into this court, to be the practice to inforce the husband to make a settlement; and as such practice has so long obtained, I shall not at this time take upon me to alter it." (3 P. Wms. 205.)

is important to observe, the very nature of the settlement to which the wife has an "equity," a settlement to her separate use, suffices to prove that however old the jurisdiction we are now discussing may be, it is more modern than the doctrine of separate estate, of which it is thus a mere ramification. There exists a recorded instance of its exercise as early as 1638; for in that year, on complaint being made that a husband was suing "in the Ecclesiastical Court for a portion due to his wife," Lord Keeper Coventry granted "an injunction to stay proceedings there, till he shall make a competent jointure."* This case is so strong, being an interference with a husband who was not taking any proceedings in Chancery, as to warrant the conclusion that the jurisdiction had ceased to be novel.

As the Chancellors came to assert the equity against a husband who sued for the fund in another court, it was not unnatural to assert it in every case in which the fund became the subject of litigation in their own court, even when the husband was not the plaintiff. Thus whenever a deceased person's estate was "thrown into Chancery" for administration, the interests of any married women who might be amongst his beneficiaries obtained indefeasible protection.

But it was in 1801 that by a brief† decision of Lord Rosslyn's the greatest extension of this jurisdiction was effected. He permitted a wife herself to come forward as plaintiff and initiate the assertion of her "Equity," so as to prevent the trustees of her personalty from handing it over to the husband without any provision being made for her. Henceforth this equity of married women was to be regarded as a definite and enforceable right; and no longer a mere chance of receiving a provision in the event of another person's having to resort to equitable litigation for a collateral purpose.

* *Tanfield v. Davenport.* Tothill's "Transactions in High Court of Chancery," p. 179. Davenport was the husband. It does not appear who Tanfield was; but the later cases show that it was usually, and probably always, upon the application of the executor himself that the Court of Chancery stayed suits for legacies in the ecclesiastical courts, in order to protect the wife's equity to a settlement.

† *Elibank v. Montolieu* (5 Vesey 737).

This decision was, however, so contrary to many earlier authorities, that it was some time before it met with universal approbation.*

When the right had assumed this full and definite form, we might regard it as a simple and inevitable step that the Court should require all persons who dealt with the trust fund to recognise the wife's equity. That step was never taken. If the husband could get possession of the fund before she filed her bill, the Court still declined to interfere with him. If the trustees chose to pay it over to him and ignore the wife's equity, the Court still declined to regard them as acting inequitably. Like contraband trade in International Law, it was a case of "conflicting rights," and the only test of the conflict was the time of their assertion. The husband has a right in the fund; if he can get the fund before she sues, he succeeds. The wife has a right in the fund; if she can sue before he gets the fund, she succeeds. Thus, even in our own day, the "equity to a settlement" which has so long ceased to be a mere spontaneous interference of judicial discretion, still retains an anomalous trace of the period when it was nothing more.

The limits of this Essay leave me no space to dwell upon the minor extensions of this right which have been made in the wife's favour: its application, after many doubts, to her equitable interests in chattels that were not personal, such as terms of years;† its application to even the smallest sums, in abandonment of the older rule that it was not worth while to settle the fund if it did not amount to £200; its application in extreme cases to the whole fund (instead of half), so as to oust the husband's claims altogether; its application against "particular assignees" who for valuable consideration had bought up the husband's rights before the fund reached his hands, and ultimately even against his "general assignees" when he ceased to be solvent, so as to prefer the wife above all the creditors. Still less have I room to narrate the efforts that have been unsuccessfully

* See Sweet's *Cases on Separate Estate* (London, 1840), p. 61.

† 4 Hare 1; on the authority of Sturgis *v.* Champneys (already cited).

made to extend it in other directions: the attempt to attach it to purely legal choses in action, so as to interfere with the husband's power of suing in the common-law courts for his wife's debts, an attempt which even Lord Hardwicke was inclined to favour, but which his successor defeated;* the attempt to give her the right of preventing the husband from making any assignment of her equitable choses in action, an attempt successfully resisted by Lord Eldon;† or the attempt to raise her "equity," from a mere personal relaxation of the disabilities of coverture, into a descendible interest, and permit her children to assert it even when she had died without doing so, an attempt which also was ultimately defeated.‡ This last-mentioned effort may remind us that the position of the children of the marriage constitutes another anomaly due to the limited principle out of which this "Equity" originally sprang. The settlement always recognises them as having a claim upon the trust funds. It is never made for the benefit of the wife alone; but invariably upon her for life only (for her separate use, without power of anticipation) with remainder to her children by the present or any future marriage. Yet the wife alone is regarded as the mistress of this equity. If she declines to assert it, the children's rights will fail; or if she, having already from other sources a fortune sufficient for herself, cannot assert an "equity," they can claim no settlement, however much they may need it. It is said that in the great majority of instances, the wives who have been separately examined in Court, have waived the claim in favour of their husbands. Lord Cottenham's Act, by permitting trust funds to be paid into Court without a suit, and the Chancery Amendment Act of 1852, by cheapening administration proceedings, greatly multiplied the number of cases in which Chancery had the opportunity of asserting this equity. On the other hand, these opportunities will be rendered considerably less frequent, and the equity itself

* 10 Ves. 90. See Bunbury 87 and 2 Atk. 420.

† 18 Ves. 84. See 1 Vin. Abr. Suppl. 475.

‡ 1 Madd. 450.

But the more modern marriage settlements are to a great extent only nominal gifts made for the purpose of restraining some incident which would otherwise have attached to the donor's estate. The earliest instances of this kind were feoffments that were made on the eve of marriage by intending husbands or intending wives simply to their (the feoffors') own use, for the purpose of freeing the land from liability to the dower or the curtesy of their intended partners. From the frequency of these feoffments arose, as we have seen, the custom of jointuring. In Henry VIII.'s reign they were in common use "to put away tenancy by the courtesy and titles of dower," as we learn from the *Doctor and Student* of 1530. But in 1535 the Statute of Uses deprived them of this effect; whilst conferring upon prenuptial jointures the remarkable property of destroying all title to dower that would otherwise have accrued to the wife in any of the husband's lands. But after an interval, during which the validity of Trusts of land had been established, similar feoffments were again made, which by no greater change than the mere duplication of the use, released the land conveyed by them from all liability to dower; though Chancery refused to permit them to release it from curtesy.

Curtesy, however, was made sufficiently rare by the introduction, within twenty years after the Statute of Uses, of settlements of an entirely novel form. By these the interest of the wife was cut down to a mere life estate, so as to exclude her husband's claim to curtesy; but her legal seisin was preserved for their enjoyment, and her inheritance was secured to her children as remaindermen.* These settlements have remained in general use down to our own day, as well where it is by the intended husband as where it is by his bride, that the lands are settled; and have quite superseded the estates-tail *ex provisione viri* that used to be employed for settlements of the former class.

* Mr. Joshua Williams, Q.C., has discovered instances of settlements upon unborn children by way of contingent remainder, made at as early a date as 3 & 4 Philip and Mary (A.D. 1556). (*Transactions of the Juridical Society* I. 47.) See Reeves III. 386, 389, for instances of the marriage arrangements of Henry VIII.'s reign; and Mr. Monro's interesting *Acta Cancellariæ* for those of Elizabeth and James (pp. 163, 266, 399, 664.) Contrast *infra*, p. 144 n.

The limitations contained in them have, however, received some additional complications of importance. Under the Commonwealth the same political misfortunes which placed every landowner in peril of being sooner or later attainted of treason, also drove into the safe privacy of conveyancing practice, some Royalist lawyers of greater abilities than were usually found in the men of the chamber. These fugitive jurists took a political as well as a professional pride in devising a limitation to "trustees to preserve the contingent remainders," which placed all settled estates beyond any peril of being lost to the children even in the event of the father undergoing attainder as a traitor. (The Catholic disabilities of the eighteenth century must have contributed in a like manner, and perhaps in a wider measure, to the development of English conveyancing, when they drove men with the legal genius of Booth and Butler from a forensic career to a less ambitious walk of practice.)

In the same century, perhaps about the same period, three other complications were added which directly affect our subject, as they were inroads upon the disabilities of *coverture*. Pinmoney * was secured for the wife's personal expenses during coverture; or sometimes the whole life estate was preserved in equity for her personal enjoyment, by giving it to her separate use; and a control over the legal and equitable inheritance was conferred upon her by the introduction of a power of appointment, (usually intended to be exercised in conjunction with her husband, but sometimes by herself alone).

Settlements of this kind, reducing the settlor's ownership to a mere life estate, were of course as effective in destroying dower as in destroying curtesy. (Often, too, they contained a clause that would bar the wife's claim to dower in all the *other* lands of the husband, by granting her, out of the settled lands, a rentcharge to take effect during widowhood, which in equity, though not at law, would operate as a jointure.) But, unlike the settlements of the pre-Reformation period, it was not for the destruction of either of these rights that they were chiefly intended,

* *Supra* p. 116.

but for the purpose of destroying the alienability of the inheritance and giving the issue of the marriage an interest which even a Recovery could not oust. For the sake of securing the children such a provision, similar settlements came to be employed even in the case of personalty; where there was no indefeasible incumbrance like dower or curtesy to be warded off. If it were to the intended wife that the personalty belonged, there was this second motive for a settlement, that without one it might be wholly lost to her and hers even if she survived her husband.

The advantages of these settlements were great, as well to wives, as to younger children and to the political interests involved in the perpetuation of family names; so great that the Court of Chancery never failed to require a settlement whenever one of its wards was about to marry. And the legislature has in the present reign testified its approval of them, by permitting the disabilities of infancy to be suspended for their creation. For the common law, to whose founders such settlements were unknown, whilst permitting infants to marry, had regarded their contracts and conveyances as voidable, even when made in consideration of their marriage. In the case of a male infant the defect might indeed be cured by his ratifying the settlement when he attained majority; and his tacit acquiescence would be a sufficient ratification. But in the case of a female infant the marriage itself had imposed a more permanent disability than that of minority; and the settlement, though availing to protect her against the husband (if he were of full age when he executed it) afforded the children no protection against her, but might be repudiated by her as soon as she became a widow. Even if she were a ward in Chancery, and the settlement were made under the authority of the Court, it would still fail to bind her; for the Chancellor had no power to supply the defect of infancy.* But by 18 & 19 Vic. c. 43 this power was established. Under it any youth of the age of twenty, or any girl of the age of seventeen, who is about to marry, may petition the court to give its sanction to the proposed settlement, which that sanction

* *Simson v. Jones* (2 Russell and Mylne 365.)

will now render "as valid and effectual as if the person executing the same were of the full age of twenty-one years." Regarded as a protest against the rules by which English law disposes of a wife's property in the absence of a settlement, much may no doubt be said in favour of this enactment; but both the economist and the physician will be apt to look askance at any measure which seems to stamp premature marriages with the approval of the legislature.

PART V.

THE WIFE'S LEGAL CAPACITY.

CHAPTER I.

GENERAL VIEW.

THE theory of conjugal unity, as laid down by the common law of England, is not that the married pair constitute a new and compound *persona*, but simply that the personality of the wife becomes merged in that of the husband; whilst his continues unaffected, except that he, unlike other persons, cannot make her any direct gift, even of realty,* or appear as a witness in criminal proceedings against her. For many purposes this theory was consistently carried out, and the wife was treated, from the commencement of the coverture until its dissolution, as being no longer a legal entity. She thus, generally speaking, loses the capacity to alien property either *inter vivos* or by will; or to conclusively accept or disclaim it; to make a contract, and consequently to incur a debt, or be made a bankrupt; to release an obligation; and to sue or be sued apart from her husband; to appear as a witness in criminal proceedings against him; or to act as executrix or administratrix without his sanction. Yet the exceptions to these disabilities are so numerous as to require detailed enumeration. And beyond them there lies the field of Tort in which a wife's acts entail,†

* Local custom may, however, render such gifts valid, as in York (Brooke Abr. *Custom*, pl. 56); and Equity as we have seen, permits them. (But all other exceptions are only apparent; a surrender, an appointment, or a gift to uses, is not a *direct* gift; a devise or a donatio mortis causâ does not become a gift, until the giver has ceased to be a husband.) Mr. Spence, in his invaluable work on the Court of Chancery, notices the Custom of York, which allowed a wife to take by immediate gift from her husband (Fitz. Prescription, 61), and regards it as "the remains of the ancient Roman law as established in Britain." I should prefer to say that it is the remains of the ancient Saxon law, which has been superseded in the rest of Britain by the reintroduction of Roman jurisprudence. (*Vide supra*, p. 46.)

† *Supra*, p. 96.

and that of Crime in which they usually entail, as complete consequences as if she were unmarried.

Moreover, whenever the law itself puts an end to the cohabitation, though without dissolving the matrimonial tie, it releases the wife from all these disabilities.

The civil death of the husband was admitted, even by the common law, to restore to the wife the powers of an unmarried woman. A like, but temporary, restoration is probably effected by his undergoing that temporary civil death which is produced by a sentence of penal servitude, until the term has been worked out or commuted. A general restoration to the *status* of celibacy, so far as property rights are concerned, is also produced by a Judicial Separation,* or even a Protection Order.† It is scarcely necessary to mention the "Matrimonial Causes Act, 1878," which Lord Penzance carried in the last session of Parliament,‡ and by which a wife who has suffered personal violence from her husband, can now obtain at petty sessions an order that will have the full effect of a decree of judicial separation.

Did we possess materials to render the inquiry possible, it would be interesting to inquire whether all the Anglo-Norman rules as to the husband's rights in the wife's property may not have arisen out of the single principle that she could not sue apart from him. From that principle it might easily come about that he should be regarded as owner of the choses in possession, whose perishable character renders it probable that all early litigation about them must have taken place whilst the husband was still alive, and therefore still *dominus litis*. On the other hand, the wife's real property, from its more permanent character, must too often have called for judicial protection, even after the lifetime of her husband, to leave the Curia Regis any chance of forgetting the Saxon tradition of her enduring rights in her own inheritance. But those property rights which the wife was never seen to assert, she might soon be supposed never to possess.

* 20 and 21 Vic. c. 85. s. 25. † Ibid. s. 21. ‡ 41 Vic. c. 19.

CHAPTER II.

ALIENATION.

THE capacity of alienation which the wife, as we have seen,* had possessed in Saxon times, was ultimately taken from her by the Norman lawyers. But it did not die out immediately upon the Conquest; and it probably lingered in popular practice even after it was extinct in legal theory. There are still extant some charters of gift which purport to be made by married women, generally, of course with the assent of the husband (though perhaps only in virtue of his life-interest);† whilst "the ancient feoffments and other sorts of charters were many times made by assent of the feoffor's wife."‡

A vivid instance of the wife's incapacity to alienate, is afforded by a case in which a woman lost £40 at cards, and paid it, but her husband sued the winner, in trover, and got it back.§

As soon, however, as it was established that on the one hand the wife's lands did not become the permanent property of the husband, and on the other that she was incompetent to dispose of them, a serious practical difficulty arose, How could a purchaser get a title to these lands?—a question which became increasingly important as alienation in general became more easy and more frequent after the accession of the Plantagenets.

The difficulty was ultimately solved by borrowing the device of a *Fine*, a collusive compromise of a collusive suit. This fictitious procedure was probably borrowed from the *cessio in jure*, and introduced into the English courts soon after Vacarius had begun in 1149 to familiarise our students with the laws of Rome. It was employed in course of time to

* *Supra*, p. 10.

† See the instances given by Madox (*Formulare Anglicanum*, Diss. §. viii.); one of which is as late as 1216, and though purporting to be made by the husband's assent, is executed by the wife alone.

‡ Madox, *loc. cit.* Cf. Reeves I. 143; and my own view, *infra*, p. 142.

§ *Rey v. Stephens*, A.D. 1609 (1 Sid. 122).

effect three kinds of alienation which the law forbade to be effected by the ordinary modes of conveyance; alienations of married women's property, alienations to religious houses, alienations of entailed estates. (These fictitious fines, which were commenced by a writ in the manner of ordinary litigation, must be distinguished from the ancient conveyances which were effected by embodying the bargain in a sealed chirograph, and simply bringing this into the King's court to acknowledge it publicly. The resemblance between the two is so close that they are often identified; but the latter are characteristic of the period which ends, the former of the period which commences, with the reign of Henry II.)*

Glanvil tells us that a wife might appoint her husband as her attorney, to levy a fine or take any other legal proceedings on her behalf.† But it must be noticed that, as he has previously explained, no principal can appoint an attorney for such a purpose, except by appearing in person before the Justices of the Bench.‡ Would a fine thus levied by, or a judgment given against the husband as attorney, have any effect upon the wife's rights in her own lands, her *maritagium*, or her dower beyond the husband's life? This question had already begun to be mooted, though it was still undecided, in Glanvil's time. He evidently inclined to the consistent view, that if the law regarded a married woman as a cypher, it could not treat her consent to her husband's acts as capable of giving them any additional validity.§ But it was urged, on the other hand, he tells us,

* See Madox. *Diss.* § 15.

† Glanvil XI. 3. Instances of such appointments in 1198 and 1201, are given in Madox. *Diss.* § 18.

‡ XI. 1. This passage must have escaped Mr. Cruise's attention, or he would hardly have written that when a wife's fine was thus levied by attorney, "it is highly improbable that she should have been examined" by the justices. (*On Fines* I. 181).

§ Glanvil, xi. 3. Cum quis itaque maritus positus loco uxoris suæ in placito de maritagio vel de dote ipsius uxoris, aliquid amiserit vel remiserit de jure ipsius uxoris, per judicium sive per concordiam, nunquid poterit mulier ipsa inde iterum placitum movere? An tenebitur omnino factum viri sui post mortem ipsius tueri? Non videtur autem, quod per factum viri sui debeat mulier in tali casu aliquid juris amittere; quia dum fuit in potestate viri sui, in nullo potuit contradicere aut contraire ejus voluntati, ita non sibi potuit contra voluntatem viri sui in jure suo prospicere. Sed dicitur contra, ea quæ in curia domini Regis gesta sunt, rata et firma esse convenit.

that proceedings taken in the King's court must be regarded as conclusive.* (It is curious that he does not treat the question with reference to married women's fines generally. Perhaps motives of convenience rendered it an almost universal practice for wives to depute their husbands to appear in court for them at the levying. The appearance to appoint the attorney might be more prompt and private, since it did not require even the attendance of the opposite party.)

Madox gives us a precedent of a fine levied before Glanvil himself, in 1184, by which two co-heiresses, with the concurrence of their husbands, made a partition of their father's estates.†

The importance of requiring the actual presence of the wife in court at some stage of the procedure, in every suit which affected her interests, is well illustrated by a curious record of 1209. Here the husband had secretly taken money for the wife's land. To give effect to the bargain, a writ of right on a false title was brought by the secret purchaser, and the husband did not appear to defend it. The wife, however, appeared to the summons, and succeeded in obtaining an assize to try the title.‡

* This passage corroborates Mr. Hargrave's view (Co. Litt. s. 183) that it was to the dignity of the court, and not to the mode of its procedure, that the efficacy of Fines was due. It has often been said (e.g., as long ago as 1479, Y. B. 18 Edw. 4, 11) that it was because of the judges' examination of the wife, that she was bound by a Fine; but this, as Hargrave says, is only a secondary cause, and "The pendency of a real action . . . in consequence of an original writ . . . should be deemed the primary cause." Except by local custom (2 Inst. 673) no examination where a suit was not pending was ever permitted by English law to render a wife's conveyance valid.

† *Formulare Anglicanum*, No. 357.

‡ *Abbreviatio Placitorum*, pp. 63, 66. (10 John. Stafford.) "Henricus de Deneston petiit, versus Nicolam de Winst. et Hawisiam uxorem suam, quatuor bovatas terræ cum pertinentibus in Buterdon per breve de recto. Et ipsa venit et optulit se versus eundem Henricum, et dixit quod terra illa est hereditas sua et quod per pecuniam et fraudem Henrici Nicolas vir suus absentat se et eam deseruit; ita quod timet per fraudem exheredari et petit justicias quod curam inde capiant, et postea offert ponere se in magnam assisam, &c."

(11 John. Stafford.) "Henricus de Deneston optulit Domino Regi xl.s pro habendo judicio suo de quatuor bovatis terræ cum pertinentibus in Buterdon; quas clamat versus Nicolam de Winestr. et Hawisiam uxorem

In Bracton's time all doubt on the subject had ceased; and it was well settled that the dignity of the King's court was such as to give effect to any disposition which a wife might make there, and to rebut all presumption of her being influenced by the husband's coercion.* Her own lands, whether in fee simple or settled as *maritagia*, might then be disposed of if her husband joined with her in levying a fine. Without his concurrence she could not levy one; and one levied by him alone would have no effect against her if she survived him. (Yet his alienation might, of course, bind the *issue* in consequence of the warranty, even in cases where it would not have bound the widow.)

But the effect of a Fine upon the wife's dower still remained to be settled. It was of course clear that if by a hostile judgment, even in a suit to which the wife was no party, the husband were evicted from lands that had been assigned as a *dos nominata*, the assignment would be rendered void. But if the husband had compromised the suit, so that instead of a judgment there was only a Fine, would this suffice to

suam. Quæ venit et dixit quod terra illa est hereditas sua, et quod ipse Nicolas vir suus corruptus donis ipsius Henrici se absentavit ita quod nunquam voluit comparere post placitum motum, et offert xl. solidos ut habeat magnam assisam scilicet utrum ipsa majus jus habeat in terra illa an ipse Henricus. Et dominus Rex motus misericordiâ et post consilium recipit oblationem ipsius Hawisiæ. Habeat ergo magnam assisam, &c."

* Bracton, fo. 322; where the widow's suit for her lands is met by the husband's alienee with the plea, "'Quod prædicta mulier personaliter fuit in curiâ domini regis cum viro suo et donum illud liberaliter et bonâ voluntate suâ sine aliquâ coactione concessit et ratum habuit; quod quidem terminari poterit per inspectionem rotulorum.' Quod quidem non esset si hoc fieret extra curiam regiam, quia ibi fieri possunt coactiones contra voluntatem, quod quidem non fieret in curiâ domini regis. Ibi enim nulla violentia infertur nec metus incutitur, nec est verisimile aliquem in curia domini regis per violentiam compulsum esse ad aliquid contra voluntatem faciendum vel non faciendum cum ibi tutum invocari possit auxilium. . . Si autem coactio intervenerit (quod de facili perpendi poterit per vultum et per gestum mulieris) quamvis in curiâ domini regis, numquam fiat inde cyrographum, sed vix inrotulatio concedatur. Et notandum quod inrotulatio per se sine cyrographo nunquam tollet actionem uxoris post mortem viri sui. . . Si autem coactio non intervenerit sed mulier hoc affectaverit, quod de facili perpendi poterit per gestum et per vultum, concedatur fieri cyrographum. Mulier enim aliquando plus amat donatorium quam seipsam vel puerum suum; et bona cautela est in inrotulatione facere mentionem de voluntate mulieris secundum quod fuerit gratuita vel coacta."

bar the widow? Bracton confesses there was a difference of opinion on that point; but gives it as his own emphatic answer, that a husband can only waive his own rights and not those of his wife, and consequently that if the widow claimed her dower, the fine would not estop her from showing that the husband had been the true owner of the land at the time of the espousals.*

Yet even when the fine of the lands assigned as dower was merely collusive, would not the fact that the wife had concurred in levying it be sufficient to estop her, as it did in the case of her own lands? It would not. For at the date of the fine she had nothing to alien; whilst her husband lived, her interest was a mere possibility of dower, and not yet a "title consummate."† The same doctrine was laid down, for the same reason, in two cases of Edward II.'s reign, to which Lord Coke refers. But legal opinion underwent a change, perhaps in consequence of the language of Henry VII.'s Statute of Fines;‡ and Coke adds [A.D. 1613] "at this day the said books of Edward II. are not held for law, for now no question is made but that if husband and wife levy a fine, the wife is barred of her dower."§

Closely resembling the Fine, was the Recovery; a fictitious device which played at least as important a part as the Fine in the history of mortmain and of estates tail, but

* Fo. 301. Cum vir uxorem suam dotaverit de re certâ, et alius eandem rem petierit, et vir ante judicium illam ei *per concordiam recognoverit et reddiderit*, nihilominus post mortem viri sui integra erit exactio dotis si uxor dotem petierit, secundum quosdam (qui ducti sunt hâc ratione quod vir potest adeo bene remittere jus proprium sicut alienum), et in hoc dubio dotem obtinebit in quacunque recognitione et redditione per pacem. Sed dicunt alii quod adeo bene potest recognoscere jus alienum sicut proprium licet judicium non intervenerit. Et quo casu cum uxor dotem petierit de re recognitâ, et excipiatur contra (quod dotem habere non debeat, eo quod vir suus die quo cam desponsavit non fuit inde seisitus [His fine confesses himself an intruder] ita in dominico et ita in feodo quod eam inde dotare potuit), et ipsa e contrario dicat quod sic; *videtur et verum est*, cum per negationem efficiatur res dubia," *etc.*

† Bracton, fo. 96. Factâ sic constitutione dotis ut prædictum est, non poterit uxor in vitâ viri circa dotem constitutam nominatam (quamvis certam) aliquid disponere, cum inde liberum tenementum habere non possit ante assignationem.

‡ Cf. the case in Henry VIII.'s reign, referred to in Dyer, 224.

§ *Lampet's Case*, 10 Rep. 49 *b*.

which was not so frequently employed to evade coverture, as it involved more expense and trouble than a Fine, and (for this purpose) had no greater efficacy. It, too, consisted of a fictitious suit; but unlike the Fine, it was not compromised, but went to judgment by default.

From very early times the Courts must have held that if any judgment concerning the wife's land or dower were given in a suit against husband and wife, it would have as binding effect as if it had been given against her when *sui juris*. But for this, it would have been possible for a woman, who knew herself to be in possession of lands that were not her own, "nubere in fraudem," (as Bracton says on another topic), so as to suspend the real owner's right of action. Moreover, before the statute of Westminster the Second (c. 4) enacted to the contrary, some judges had even gone so far as to hold that a judgment by default against the husband, even in an action in which she was not joined with him as co-defendant, would bar her dower. It is not improbable that these actions had been purely fictitious; for Recoveries were already well-known, through their employment in evading the law of mortmain. It is certain that in course of time perfect Recoveries, in which the wife was made a defendant, so that her collusive default effectually barred her, came into use as a means by which she could escape from her incapacity to alienate, and were applied both to her own lands and to her dower.* But we have no evidence as to the time at which this step was first taken. We only know that the law originally permitted husband and wife to defend suits brought against her rights; afterwards allowed them to compound such suits; and ultimately made even their defaults conclusive.†

It is important to notice that Equity 'followed the law,' by forbidding the alienation of a wife's equitable property except by the same ceremonies that were required for her legal

* 2 Rep. 74. "A common recovery had against husband and wife shall bar the wife of her dower, and yet the wife shall not have any recompence in value; and therefore in strictness of reason it is hard to be maintained; but common usage, and the intent of the parties, makes it a bar."

† See Hargrave's note to Co. Litt. s. 183; Reeves II. 104.

interests. Mr. C. P. Cooper* has translated from the Year Books a remarkable case in which Bp. Nevil, the Chancellor of 1468, was called upon to decide whether a married woman's alienation of her equitable interests could be held valid in equity, when not effected with the legal solemnities of a Recovery or Fine. All the circumstances of the case were in favour of the validity of the alienation; for the purchase money had been duly received by the lady, her husband had concurred with her in making the contract of sale; and it had been at their joint request that her trustee had conveyed the land to the purchaser. Hence when she, on becoming a widow, brought a suit against the trustee, conscience might fairly appear to be in favour of leaving the transaction undisturbed. But the judges of both Benches had been called in to assist the deliberations of the Court. The Chancellor fully adopted their view of the matter, agreed that her contract to sell was void, since "the wife cannot consent during the coverture; what takes place by dread and coercion cannot be called consent, and *all that a married woman does shall be taken to be by dread of her husband.*" The purchase money was accordingly decreed to be made good a second time by the unfortunate trustee; the Chancellor declaring that the estate itself would have been restored to her from the hands of the vendee, had she brought her subpœna against him, and shown that he purchased it with notice of the coverture.

Since Chancery had little respect for legal fictions, the principle thus broadly laid down might well have been applied without the one exception which the Common Law made to it—the case of a fine or Recovery. The suggestion was actually made to treat even these solemn alienations of the wife's estate as being made only "for fear" of her husband, and therefore as void in Equity; but it was rejected "for the general inconveniences that might ensue to that highest assurance."†

In the course of two centuries, and under a female reign, a different doctrine began to find favour in Chancery. Hence in 1590, Bp. Nevil's decision, on being quoted, was called in

* Reports, 527; Y. B. 7 Edw. IV. 14. † Cary 6.

question.* But when James was on the throne, in 1609, a similar point arose, and the aid of the Common Law judges was again invited; they returned a certificate that the wife's right was not barred by her contract of sale. (It should be noticed, however, that in this case the legal estate was in the wife; and it does not appear that any money had been actually paid under the contract).†

In later days, however, when the Chancellors had come to permit the creation of Separate Estate, they ultimately (as we have seen ‡) rendered that species of equitable property freely alienable.

In 1833 both Fines and Recoveries were abolished by 3 & 4 Wm. 4. c. 74. This statute permits the wife to alienate all her interest in any freehold lands (and in some copyholds) by an ordinary deed of conveyance, if the husband concur in it, and it be "acknowledged" by her before a judge or two commissioners. Every such acknowledgment must be preceded by an examination of her 'apart from her husband, touching her knowledge of such deed, to ascertain whether she freely and voluntarily consents thereto.' A simpler, cheaper, and more expeditious mode of alienation than Fines or Recoveries was thus provided; without abandoning the security that they had afforded as well for the husband's interests as for the official protection of the wife against his undue influence.

The same Act made a more substantial innovation by a remarkable clause (s. 91) empowering the Court of Common Pleas to dispense with these securities, and authorise a wife to dispose of her property in the same manner as if she were a feme sole, on her producing evidence that it is practically impossible for the husband to execute the deed. His own interests in the property of course remain unaffected by such a conveyance. It may be questioned whether in

* Tothill, 155.

† *Dockwray v. Pool.* Tothill, 162; where the facts are thus stated.—"A man having three daughters intailes his land upon them; after, one of them married, and being a *Feme Covert*, with the consent of her Husband was contented, and agreed, to take one thousand pounds in consideration and extinguishment of her right as co-heire."

‡ *Supra* p. 110.

any case the acknowledgment affords a protection commensurate with the additional expense of four or five pounds which it adds to the cost of the conveyance.

The powers thus conferred have been extended by the 'Act to Amend the Law of Real Property' (8 & 9 Vic. c. 106) to the 'possibilities' which at common law were inalienable by deed; and by Sir Richard Malins' Act (20 & 21 Vic. c. 57) to reversionary interests, and 'equities to a settlement,' in personal estate. Such reversionary interests had previously been incapable of conclusive alienation; for the husband had no absolute title, since the property had not been reduced into possession, whilst the wife could not perfect the title by a Fine, since Fines were only applicable to real estate. (Three classes of these interests, however, still remain excepted from the power conferred by Malins' Act; those created by an instrument made before 1858, or by a marriage settlement, or by an instrument which expressly prohibits their alienation.)

CHAPTER III.

THE WIFE'S TESTAMENT.

In the various systems which constituted the *droit coutumier* of præ-revolutionary France, we find everywhere the germ of the elaborate modern system of "Community of Goods" between husband and wife. A unique species of partnership is established, extraordinary at first sight to a student accustomed to the harsh simplicity of the Anglo-Norman rule. The wife's personalty falls, indeed, under the husband's absolute control, and may be disposed of by his will. The *collaboratio*, the acquisitions (whether of realty or personalty) made by the pair during coverture, are similarly at his disposal. But both these funds, together with the husband's own personalty, constitute a common stock, of which the wife is regarded as joint proprietor with him. So long as both he and she are alive and cohabit, all is under his control, but the moment that the misconduct or death of either dissolves the matrimonial tie, or suspends cohabitation, a partition takes place, and her separate interests revive. Thus her interest is not, as in England and Normandy, a mere expectancy contingent on her surviving her lord; but even when he is the survivor, her share devolves upon her heirs, and they claim from her husband the customary proportion of the whole common stock, including his own contributions to it as well as hers. (The customs differ as to the proportions in which the stock is to be divided: the earlier ones adopting, like us, the one-third share which the Ripuarian code gave the wife, whilst the later ones preferred to give each spouse an equal moiety.)*

A similar system was in force throughout Scotland until 1855. Before the passing of 18 Vic. c. 23, the wife was so truly a co-proprietor of the 'goods in communion,' that even when she died in her husband's lifetime her share of them

* Gide, pp. 412—419.

would pass under her will, or devolve on her next of kin if she were intestate.*

The law of England in Bracton's time,† and the law of the Isle of Man‡ down to the reign of George III., seem to me

* Bell's *Principles*, par. 1580. Erskine's *Institutes of the Law of Scotland*. III. 9. 21.;—"Upon the dissolution of a marriage by the predecease of the wife without issue, the goods falling under communion divide in two; the one half is retained by the surviving husband, who was one of the *socii*, and who, standing the marriage, had the absolute management of the whole; the other half, being the share falling to the wife, the other partner, upon the division of the society-goods, descends, as her absolute property, to her next of kin." [If there were issue, the goods were divided into thirds, instead of halves]. *Ibid.* I. 6. 28. "The wife's powers in making grants which are not to take effect till after her death are more ample; because the husband's interest ceaseth before such grants or deeds can have the least operation. Perhaps she cannot, in the form of a writing *inter vivos*, dispose of or burden such moveable subjects as may accrue to her on the death of her husband, though his interest be then at an end; because no subject can be conveyed effectually by a present deed of alienation, to which the grantor has not a proper right at the date of the grant; and the wife has no more than the hope or prospect of a right to the goods in communion while the marriage subsists. But she can bequeath her share of these goods by *testament*, even without the husband's consent, in the same manner that a minor can test without the consent of his curators. And she may upon the same ground become bound for a sum of money, in the form of a deed *inter vivos*, if it be not to take effect till after her death. Though minors are, from the weakness of their judgement, and instability of their inclinations, incapable of settling the succession of their heritable estates; yet wives, those at least who are of perfect age against whom unripeness of judgement cannot be objected, may, it is thought, lawfully execute such settlements, even without their husband's consent; for no reason occurs why his consent should be necessary to deeds which can neither affect his interest, nor have the least operation till his *potestas maritalis* be at an end."

† Bracton, (fo. 61). "Si mulier fuerit sub potestate viri constituta, testamenti factionem non habebit absque viri sui voluntate, propter honestatem. Tamen receptum est quandoque quod testamentum facere possit de rationabili parte quam habitura esset si virum supervixisset, et maxime de rebus sibi datis et concessis ad ornamentum quæ sua propria dici poterunt sicut de robis et jocalibus."

‡ An Act of 1777 (given in Mills' *Ancient Ordinances of the Isle of Man*, p. 374) runs thus: "Whereas femes covertes are by custom entitled to one-half of their husband's personal estate and effects within this isle, originally meant as dower; which by usage hath been so perverted that by this custom married women now claim an absolute and distinct property in one-half of the goods and chattels of their husband, (insomuch that they make wills during coverture and dispose of one-half; or in case of their dying intestate without issue, administration is granted to their own kindred in seclusion of the husband's right). Whence it often happens that a man in flourishing, easy circumstances is by the accident of his wife's death, utterly ruined, his goods and effects being immediately inventoried and sold, and one-half of their value distributed

to have retained a marked trace of this system of community. Bracton and the Manx jurists admit it to have been a common practice for wives to make wills during coverture, and to bequeath by them an interest in their husband's goods as well as in their own. It is not unnatural that a practice so much at variance with that "Unity of Person" which formed the leading principle of the law of married life in both islands, should be regarded by them as an innovation; and that they should suppose the more general rule to be the older one. That supposition is contradicted by all that we can glean of the earliest history of both the English and the Manx systems. The Germanic codes appear to have regarded the wife as fully competent to make a will, whenever she had anything to bequeath. The limited rule before us, which restricts that competency to only a part of the conjugal estate, seems to show that the system of "Community of Goods" once existed upon our own soil; and that England and Man, in their course from the Scandinavian to the Anglo-Norman law of marriage, passed through the stage at which France and Scotland were so long contented to stop.

among strangers. To prevent which, be it enacted: That from henceforth, upon the death of a husband before his wife, one-half of the whole goods and chattels, purchased lands and premises [*In the Isle of Man, lands purchased were legally regarded as personalty*] shall become the property of his wife or widow, to be disposed of at her own will and pleasure, subject to one-half of the debts; but that in case the wife dies before her husband, and without issue, her right in such goods and chattels, lands and premises, shall cease and determine, and the same be and remain wholly to her husband as his sole and absolute property. Provided nevertheless that nothing herein shall prevent a wife from making a will of the lands, premises, and effects aforesaid, even in the lifetime of her husband, as heretofore accustomed, in favour of the lawful issue of her body, or to her husband, but to no other persons whatsoever." The same principle is attested by implication in a law of 1593 (Mills. p. 77), which says: "Heretofore it hath been a law in the said Isle of Man that any wife going from her husband for any crime, either adultery or for any other cause, might . . . give away the one-half of all such goods and chattels as her husband and she were seised of, to any person whom pleased herself; which is thought to be against the laws of God and the good government of that his Honour's isle. It is therefore ordered . . . that if any wife hereafter shall commit adultery and be thereof lawfully convicted . . . she shall have no more of her husband's goods than shall be agreed on by . . . his Lordship's council for her maintenance." (With this compare Canute's 54th Law, already cited, p. 28 *supra*.)

It may be added, that unless we assume some such conjugal community to have been familiar in England when the "Laws of Henry I." were compiled, it is impossible to attach a meaning to the enigmatical law that we have already cited from them,* which directs that "If a woman die without children, her kinsfolk shall divide her share with her husband." These words treat the wife as being normally possessed of some joint-ownership, which is truly her own, and transmissible to her successors, even during her coverture; and with whom, excepting her husband, can she have been thus regularly a co-owner?

Moreover this supposition enables us for the first time to account for conveyances which were made in the Anglo-Norman period by husband and wife jointly;† and for the many Saxon instruments (of a character intermediate between wills and settlements) in which both husband and wife concur in determining the succession to their property.‡ Of such documents no satisfactory explanation, so far as I know, has been hitherto given; but if Community of Goods existed in the period to which they belong, they become at once intelligible.

The system of Community, though probably not yet regarded as obsolete by popular morality, was not admitted into the jurisprudence which Henry II.'s justices consolidated. Glanvil treats all testaments made by married women as invalid, on the express ground that the goods they are attempting to bequeath are the property of their husbands—a reason identical with that given in one of the earliest Year Books.§ He admits indeed, the frequency with which they had made wills disposing of one-third of the husband's personalty; but insists that this had been done

* *Supra*, p. 31. † Supra p. 130.

‡ I would especially notice a remarkable document given in Thorpe's *Diplomatarium*, p. 595, in which part of the property is given by the husband, part by the wife, and part, again, by husband and wife jointly. Must we not conclude that these three parts were respectively the husband's own, the wife's Fatherfee, and the common stock?

§ Y. B. 30 Edw. I. p. 30 *arg.*. "Femme ne purra aver properte de chatel vivant son baron; par quei ne testament fere, ne executors aver."

only by the praiseworthy indulgence of the husband.* Bracton, as we have seen, gives a similar picture.

In the secular courts wives thus lost the power of Testation because the principle of Community was distasteful to the Anglo-Norman lawyers, accustomed to the "good old rule and simple plan" by which the husband took all he had the power to take, and kept all that he took. But the Church regarded Community as the realisation of her own aims; combining at once the principle of the husband's headship, and of the wife's partnership in all his gains and doings. Hence the ecclesiastical courts continued to treat the wills of wives as valid, long after the Common Law had adopted a contrary doctrine. Archbishop Stratford, in Edward III.'s reign, seems to have been in the habit of acting upon them; and Lyndwood, in Edward IV.'s, expresses surprise that his own contemporaries considered them void unless made by the husband's express licence.†

Licenses were probably often given by husbands to their wives to enable them to make wills. And the practice was at last—though not without a difference of opinion amongst the judges—recognised by the Common Law courts as rendering the will valid, and entitling the executor to bring actions under it.‡ Such a will, it appears, would give the executor not only such of her choses in action as still remained unreduced, but even her paraphernalia (though these were in the fullest manner the husband's). It was, however, decided unanimously in 1590§ that no legacies could be given by such a will; and hence its only effect would seem to be to substitute a stranger for the husband in the administration of the property that devolves upon the husband as her next of kin.

* Glanvil (vii. 5). Mulier sui juris testamentum facere potest. Si vero fuerit in potestate viri constituta, nihil sine viri auctoritate facere potest etiam in ultima voluntate, de rebus viri sui. Veruntamen pium esset et marito valde honestum si rationabilem divisam uxori suæ concessisset, scilicet usque ad tertiam partem rerum suarum quam viva quidem obtinuisset si maritum suum supervixisset (ut plenius infra liquebit); quod plerique mariti facere solent unde mariti commendabiles efficiuntur.

† Fo. cxxv. ‡ Y. B., 4 H. 6, 31. A.D. 1426.

§ *Finch v. Finch* (Moore 339). "Des nemy de doner legacies."

Wills of land were of course unknown to the common law, except in a few boroughs which had resisted the inroads of the Anglo-Norman jurists.* Where the Saxon power of devise was thus preserved, the judges seem to have permitted it, as in Saxon times, to be exercised even by married women; but required the husband's licence, as in the case of personalty, though it was the heir, and not he who suffered.† When Chancery began to permit devises to be made of the *use* of lands, an effort was made to extend the permission to wives; but it failed. In one case, a woman conveyed her lands to her own use, and then married. After marriage she devised the use to the husband, and died. Chancery, in 1479, declared the will void.‡ In the next century the Statute of Wills rendered the greater part of our soil fully devisable; but the lands of married women were expressly excepted from its operation.§

Soon afterwards the rise of the doctrine of Separate Use ushered in the chief exception to this disability. Wills of separate estate, both personal and real, seem to have been in vogue at least as early as Charles I.'s reign (the Chancellors apparently holding that the Statute of Henry VIII. could not apply to a species of property which was unknown in

* The power of devising gavelkind lands in Kent appears to be merely a creation of the judges of Charles II.'s reign.

† The *old* Natura Brevium in its note on *Ex Gravi Querela* says, speaking of a wife's devise of land, "el ne poet faire testament mez del assent son baron." Brooke (*Abridgement*, tit. Devise, 32, 34) mentions two cases at Nottingham in 1329 and 1332, in which a wife's devise of such land *to her husband* was held void, on the ground that it must be regarded as an attempt of the husband to convey it to himself. But both Brooke and Viner (Baron and Feme, R. a.) assume that no such presumption of coercion would have been allowed to interfere if the devise were to a stranger; and "by the custom of London the wife may devise *to her husband*, or to a stranger with assent of her husband" (Bohun's *Privilegia Londini*, p. 156). The Statute of Henry VIII. has, I presume, destroyed all these customary powers by its sweeping prohibition of devises by wives; and a custom for a feme covert to devise is said to be unreasonable (1 Sid. 17). Yet the Court of Chancery was informed about three years ago that the women of the Isle of Portland still claim and exercise the right of devise during coverture. Cf. Hutchins' *History of Dorset*, II. 355.

‡ Y.B. 18 Edw. 4. 11. It is remarked in the argument of the case, "The feoffment prior to the coverture is to the intent that the alienation of the husband shall be ineffectual."

§ The supplementary statute 34 and 35 Hen. 8. c. 5. s. 14, provides that wills of land made "by any woman coverte shall not be taken to be good or effectual in the law."

his reign). Yet the former can scarcely be said to have been fully established until 1789; and the latter were first rendered valid by Lord Westbury's decision in 1865.*

Meanwhile, however, the development of the system of Uses had supplied a means by which a will, even of realty, might be made by a married woman. If the property were settled to such uses or trusts as she should appoint, the Power thus created might be exercised by her in spite of coverture.† For she merely filled in, as it were, a blank which the settlor had left for her to fill in; and the disposition of the property did not spring from her, but from him; just as where (which even the common law judges had always permitted) she executed a deed as agent for another person. "Such powers ought to be expounded benignly at this day," said Chief Justice Bridgman in 1662, "though formerly they were taken strictly." Yet he decided that she could not execute the power during coverture if her doing so would divest herself (and therefore her husband) of any interest in the lands.‡ Since that time, however, it has been settled that a power of any kind, even one appendant to an interest, may be exercised by a wife.§

A married woman who held the office of executrix (which, however, she can only do by her husband's assent), was always allowed to make a will for the purpose of appointing her successor. But nothing can pass under such a will except those assets of her testator which are still outstanding; any that have reached her hands, and are still undistributed, must at law remain vested in her husband.

The general causes which the law allows to restore to a wife during coverture the property rights of an unmarried woman—the husband's civil death,‖ his temporary civil death, and a decree or order under the Divorce Act—of course restore to her the power of testation.

There are thus seven exceptions, now in force, to the general rule that a married woman cannot make a Will.

* *Supra*, pp. 109, 110.

† See in Rolle's Abridgement (I. 329 *et seq.*) various cases of wills of personalty, and in 1637 a case of a lease of realty, made by married women under powers.

‡ *Antrim v. Buckingham* (2 Freeman 168). See also 2 Freeman 91.

§ Sugden on Powers I. 181 (ed. 1845).

‖ *Countess of Portland v. Prodgers* (A.D. 1689. 4 Vin. 152). *Vide supra*, p. 129.

CHAPTER IV.

CONTRACTS.

THE most remarkable exception to the wife's incapacity to contract or to sue alone, is afforded by the custom of London. It may be doubted here, as in other instances, whether we are to regard this resemblance to more modern theories as an anticipation or as a survival; whether, in other words, we must attribute it to the rapid social development which the commercial life of the busy city fostered, or on the other hand to those chartered liberties which enabled the freemen to preserve from Norman innovation the jurisprudence of an earlier age. In the London customs of Distribution we shall find both causes at work, each in its turn succeeding in separating the city law from the laws of the realm.* The London wills of realty we may confidently regard as a relic of Saxon, and probably even of Roman, influence. And as the London wife's peculiar powers are not limited to her commercial engagements, but extend even to proceedings *ex delicto*, I prefer to consider them also as a survival.†

* *Supra* pp. 66-68.

† The customs as set out in the *Liber Albus* (Bk. III. part 1) may be thus translated :—"Where a woman that hath a husband useth any craft within the said city by herself only, wherewith her husband doth not meddle ; such a woman shall be charged as a sole woman for all that which toucheth her said craft."

"And if the husband and the wife be impleaded in such a case, the wife shall plead as sole in a Court of Record, and shall have her law and other advantages by way of plea, as a woman alone, and if she shall be condemned she shall be put in prison until she hath made satisfaction. The husband and his goods shall not in such a case be charged or impeached."

"And if a woman that hath a husband have any house or shop within the said city, as though she were a woman sole, she shall be charged to pay the rent of the said house or shop, and shall be impleaded and pursued as a woman sole, by way of debt if need be, notwithstanding that she was married at the time of the lease, the lessor not knowing thereof."

"And if a plaint of trespass be made against a man and his wife for a trespass done by the wife solely, then the wife shall answer alone without her husband, if the husband come not ; and shall have plea as a sole woman, and

By a series of cases commencing as early as the close of the thirteenth century the Common Law courts fully conferred upon the wife the powers of contracting, and of suing and being sued in tort or contract, as freely as if unmarried, wherever she was permanently and involuntarily deprived of her husband's companionship by legal act, even though the marriage tie remained undissolved.* Such a case would arise whenever a husband abjured the realm, was admitted to the cowl, or was banished for life. He could never again appear within the jurisdiction of our courts; so she must be allowed to sue alone, lest she become an outlaw.

In the seventeenth century this concession was extended to cases where the separation, though involuntary, was not permanent, as in the case of the husband being transported for a term of years, or of his being an alien enemy.†

In the eighteenth century, under the influence of Mansfield, the further step was taken of extending it to cases where the separation was voluntary, and the husband could legally return to cohabitation. In 1785 the King's Bench were unanimous upon this point; and Lord Mansfield justified it in the characteristic words, "It has been properly said that, as the times alter, new customs and new manners arise; these occasion exceptions, and justice and convenience require different applications of these exceptions, within the principle of the general rule."‡ Mr. Justice Ashurst similarly urged that the common law disability could not extend to a wife who had assets available; "the incapacities of a feme covert are not founded upon the same ground as those of an infant, whose disabilities arise from a want of

if she be attainted of trespass, she shall be condemned and committed to prison until she hath made satisfaction."

"And if a plaint of trespass be brought by the husband and the wife, of battery done to the wife, in such case the wife shall be received for herself and her husband, to pursue and recover damages against the defendant, although the husband be not present."

* Co. Litt. 132 b.

† *Derry v. Mazarine* (1 Ld. Raym. 147; A.D. 1696); *Sparrow v. Carruthers* (1 T. R. 6).

‡ *Corbett v. Poelnitz* (1 T. R. 5). In 1783 the same court had similarly decided in *Ringstead v. Lady Lanesborough*.

discretion; but [are established] first because she has no property, and secondly because it would be unreasonable to permit her to affect the property of her husband." In 1798 Mr. Justice Buller, with strict consistency, expressed a strong opinion (*obiter*) that a similar concession should be made where the separation was the woman's own act; and that an eloped adulteress should, in mercy to herself, be permitted to contract, sue, and be sued, alone. But no actual decision ever went to that length.* Yet, as we have seen, a woman who voluntarily, however innocently, quits her husband, releases him from all obligation to supply her with necessaries, unless there has been the grossest misconduct on his part. The separation confers exemption upon him, yet it does not restore capacity to her. She goes forth into the world with neither money nor credit, for she lost the one by marrying him and the other by leaving him. The common law punished her incompatibility of temper with a severer forfeiture than it inflicted upon felony, for to the felon it allowed some pittance out of his goods to prevent him from starving.† She is, as Lord Lyndhurst described the wife who had won a divorce *a mensa et thoro*,

"almost in a state of outlawry. She may not enter into a contract, or if she do she has no means of enforcing it. The law, so far from protecting, oppresses her. She is homeless, helpless, hopeless, and almost wholly destitute of civil rights. She is liable to all manner of injustice, whether by plot or by violence. She may be wronged in all possible ways, and her character may be mercilessly defamed; yet she has no redress. She is at the mercy of her enemies. Is that fair? Is that honest? Can it be vindicated upon any principle of justice, of mercy, or of common humanity?"‡

Such considerations would probably have led Lord Mansfield to concede to the fugitive wife a legal capacity of contracting. But the opportunity never arose; nor would that concession have proved more permanent than did the similar one of 1785.

With the dawn of another century the surface of the

* *Cox v. Kitchin* (1 Bos. and Pul. 338). Cf. the remarks upon *Manby v. Scott*, *supra*, p. 98.

† "In pejor case que ceux queux commit treason ou felony, car felons averont de lour biens reasonable estovers."—*Manby v. Scott.*

‡ Hansard, cxlii., 410.

mirror changed. The great jurist who "never loved common law so well as when it was like equity," no longer presided over the King's Bench. Lord Kenyon had set himself to the task of "restoring the simplicity and rigour of the common law," by purging it of the ameliorations which the wider intellect of Mansfield had instinctively introduced. None of these had jarred more upon the legal mind than that which made the judges treat a wife as a single woman whenever she practically was one. But the innovation was so firmly established* as to require the most solemn procedure for its overthrow. When, in 1800, the point arose, all the twelve judges were summoned, and the case was twice argued.† It was then established that a mere private agreement could not alter the wife's status, and therefore, after a deed of separation she still lay under all the legal disabilities of coverture. It may be conjectured that the relaxed morals of English society in that era of revolution, war, and adolescent princes, had rendered such separations sufficiently common to give this twenty years' controversy still greater importance than it now possesses. Lord Campbell has pronounced the retrogressive action which Kenyon took in it to be not only doubtful in policy, but even at variance with the true analogies of the common law.‡

The legislation of 1870 added two new exceptions, which extend to all women whether married before or after the passing of the statute. The first and eleventh sections of the Married Woman's Property Act give the wife a separate ownership in, and an independent right of action for, her earnings in any employment or trade which she carries on separately from her husband;§ and thus impliedly legalise (at least as against the other party to them) such of her contracts as are involved in the prosecution of a separate calling.

Again, by the tenth section every wife is empowered to insure her own or her husband's life for her separate use; "and the contract in such policy shall be as valid as if made with an unmarried woman."

* Cf. 2 Bro. C. C. 385; and 1 H. Bl. 334.

† *Marshall v. Rutton* (8 T. R. 545). ‡ Lives of the Chief Justices, III. 47.

§ *Supra*, p. 72. See *Summers v. The City Bank* (L. R., 9 C. P. 580).

CHAPTER V.

THE WIFE'S CRIMES.

THE changes which marriage produces upon the wife's position before the criminal law are but few.

The conjugal unity of the married pair is so far recognised as to render it impossible for them to be guilty of conspiracy by combining merely with each other for an illegal purpose; for a conspiracy requires two parties. It is again recognised as so far identifying her possession with his, that no taking and carrying away of his goods by her will amount to a larcenous asportation. The domestic duties of the wife are recognised as so imperative that she does not incur the guilt of an accessory by receiving or relieving her husband after his commission of a felony. And that terror which the mediæval judges regarded his presence as apt to inspire in her mind,* is still recognised as a possible excuse for her taking a subordinate part in crimes that he commits. But the limits of this excuse are as uncertain as its foundation is unsound. It is certainly recognised in all the lesser felonies, and in every misdemeanour that does not concern the management of the household. But the learned editor of *Russell on Crimes* contends with much show of authority that it is no longer limited to these cases; and that it would be applied even in cases of murder, on the one hand, or of domestic misdemeanour, on the other, now that it has been established to be merely a *primâ facie* exemption, which will fail if the circumstances of the case show that she took an active and voluntary part in the crime.

We have already described a similar exemption as being applied to cases of theft at a very early stage of the Saxon law†; and it reappears in connection with that particular crime, in the primitive codes of Wales. The Welsh laws enumerate "Three persons who do not forfeit life—a wife in a joint theft with her husband; a boy under age; and the necessitous man for the theft of food, after he has traversed

* *Supra*, p. 136. † *Supra*, p. 24.

three *trevs* and nine houses in each *trev* without obtaining a gift although asked for."* The same rule is repeated afterwards with this reason added,† "For the husband is the head; and if he be hanged, she is not to be hanged. The still older Dimetian Code‡ gives a similar rule; but mentions, on the other hand, "Three cases wherein a wife is to answer without her husband; the first is, for homicide committed by her by the act of hand and foot; the second is, for theft committed by her unconnected with her husband; the third is, for the title to land in her own right."

The history of this qualified exemption of the wife for the crimes which she commits in her husband's presence, has been elaborately traced by Sir James Stephen from Bracton downwards.‖ Bracton, however, grants her an exemption only as accessory *after* the fact; maintaining, exactly as Ine had done nearly six hundred years before, that she does not become one by merely receiving goods he has stolen without taking any active steps to secrete them; and that she is not bound (as other members of the household are) to give information of his crimes. But he adds that she is bound not to give assistance or consent to her husband's felonies; and that she must not obey him "in atrocioribus suis [*or*, seu] latrociniis." However, in Edward III.'s reign the judges dealt with a case of larceny in which she was the actual thief; but excused her on the ground that a husband's command without any further coercion was sufficient to deprive a wife's felony of its criminal character.¶ The development of the principle of benefit of clergy is usually assigned as the real ground for this extension of the rule. Without some such exemption it would have followed that when a husband and wife were jointly indicted for felony, he might have claimed his clergy and escaped, whilst she, though in all probability the less heinous offender, must suffer death. In the sixteenth century, if not

* *Ancient Laws of Wales*, p. 660.

† Ibid, p. 731. ‡ Ibid, p. 226.

‖ *Digest of the Criminal Law.* Note II. Cf. Bracton 152, Fleta 56, and Nichol's Britton, vol. i., p. 120. ¶ 27 Ass. 40.

still earlier, a limit was imposed on the exemption, and it was held not to extend to treason, murder, or manslaughter. When benefit of clergy was extended to women in the reign of William III., the real grounds of the exemption would become obscure; and to this we may attribute its extension in modern times to cases of mere misdemeanour.

Down to the present century it was the general opinion of lawyers that in all cases of misdemeanour the wife was equally liable to conviction, whether the husband was present when she committed the crime or not. But in 1829 Mr. Justice Bayley directed the acquittal of a wife who was being tried before him at the Durham assizes for a misdemeanour committed in her husband's presence, on the ground of this constructive coercion. And in 1837 the Central Criminal Court followed his rule, and held that "the reason of the thing is" for the same rule to apply to lesser crimes which applies to felonies."* Some older cases, however, are generally regarded as being still binding, in which it was laid down that for a misdemeanour which consists in the ill-management of the household, the husband's presence is no excuse. In such a case, indeed, the very nature of the offence is evidence that the wife was an active offender.

The Criminal Code which now lies before Parliament proposes to enact that, "No presumption shall henceforth be made that married women committing offences in the presence of their husbands do so under compulsion by their husbands." (sec. 22.)

Our view of the peculiarities of a wife's position before the criminal law would not be complete without an allusion to the disabilities which that law imposes, as well as to these exemptions which it confers, upon her. It does not carry the doctrine of conjugal unity to the extent of ignoring all physical injuries that a husband may inflict upon his wife. For such acts he may be criminally liable; and the law even aids her in prosecuting him for them, by suspending the rule which usually renders her incompetent

* *Rex v. Price* (8 C. & P. 20).

to appear as a witness against him in criminal proceedings. But acts which would amount to an assault if committed against a stranger, may be legally innocent when committed by a husband against a wife. A doctrine, whose inhumanity has often provoked hostile criticism from law reformers, and whose legal validity has lately been challenged by Sir James Stephen,* renders it lawful for a husband to exact the *debitum carnis* by force, in spite of his wife's utmost resistance. Another, and less exceptionable, rule recognises his right to restrain her from acts of unwarranted disobedience, by placing a check upon her movements. Beyond this, modern English jurisprudence does not permit him to go; but our older law allowed him not merely to confine, but even to chastise her.† However, in James I.'s reign, in the case of Sir Thomas Seymor, who was in the habit of beating Lady Seymor, the judges expressed an opinion that a wife might have a remedy against her husband "for *un*reasonable correction."‡ But even this limited right of chastisement began to fall into discredit in the days of Charles II., rich though they must have been in occasions for its salutary exercise. Sir Matthew Hale held that the moderate "castigatio," which the old authorities had declared to be permissible, was not to be understood "of beating, but only of admonition, and confinement to the house in case of her extravagance;" and his colleagues agreed with him.§ Yet there continued to be jurists, even in the following century, who still maintained a husband's right to beat his wife, so long as he did not do it "outrageously."‖ Blackstone, however, treats that doctrine as antiquated; though

* *Digest of Criminal Law*, p. 172; commenting on 1 Hale P. C., 629.

† The old French law similarly allowed him to beat her "sans mort et sans mehaing," and otherwise "resnablement castier" her. Moreover it stimulated him to an assiduous correction of her conduct, by making him civilly responsible for her torts. So, too, did Scottish law, but it released from this responsibility if he showed that he had done his best to discipline her, and "sæpius eam castigabat, in quantum poterit." See Gide, p. 413; Skene II. 29.

‡ Moor, 874.

§ *Lord Leigh's Case* (3 Keble 433). A.D. 1675. Cf. F. N. B. 80.

‖ Hawkins P. C., *tit.* Articles of Peace; Bacon's Abr., *tit.* Baron and Feme, B.

admitting that the lower classes of society, "who were always fond of the old common law," still clung, both in theory and practice, to their ancient privilege. To our own day, this right of reasonable chastisement still finds a place among popular legal superstitions, coupled with a plain practical rule, that the bounds of reasonableness are not transgressed unless the instrument of punishment exceed the thickness of the chastising husband's thumb. In this there is a curious resemblance to an old Welsh law,* which prescribed to the husband who beat a disrespectful wife, a maximum of "three strokes with a rod of the length of his forearm and the thickness of his middle finger."

The power of confinement, which the humaner judges of modern times have substituted for the power of chastisement, was unanimously upheld by the King's Bench, in 1722, as legal in all cases where, if the wife were allowed her liberty, she would "make an undue use" of it.† Thus in the present reign, a husband was pronounced to be justified in forcibly detaining his wife in the house when she causelessly wished to live apart from him, though it was not apprehended that she would misuse her liberty any further than by simply quitting her home.‡

The husband is thus liable to criminal proceedings for any injuries that he inflicts upon his wife; and even for an ordinary assault she may now obtain articles of the peace against him. But it has been recently decided that those injuries can give her no right to recover pecuniary damages against him, even though the marriage have been dissolved before she brings her action.§ The doctrine of conjugal unity holds universally in the law of tort, though not in the law of crime; and therefore, no wrongful act which the husband may commit against the wife can give her any civil rights against him. Had any such rights arisen, it would, of course, have been impossible for her to enforce

* *Ancient Laws of Wales*, p. 436. Cf. p. 44, cited p. 10, *supra*.

† *Rex v. Lister* (Strange, 478).

‡ *In re Cochrane* (8 Dowl. 630).

§ *Phillips v. Barnett* (L. R., 1 Q. B. D. 436).

them whilst the coverture continued; and thus this important question never arose for judicial settlement until the modern facilities of divorce made it necessary to determine whether the absence of such actions had been due to an inherent defect of right, or merely to the suspension of remedy by the temporary difficulties of procedure.

These principles of criminal liability and civil immunity apply to injuries inflicted by a wife upon a husband, just as to those inflicted by him upon her. But it may be remembered that the common law, whilst only punishing the husband who killed his wife with the ordinary penalties of murder, regarded the woman who killed her husband as guilty of Petit Treason, and condemned her to the flames. For several generations, however, before the statutory abolition of this doctrine in 1829, it had become the invariable custom to delay the actual burning until after death had been produced by strangulation.

PART VI.

THE ANGLO-INDIAN LAW.

So long as English law is permitted to remain uncodified, a study of the chronological development of its different parts will constitute the only source of really accurate legal knowledge. The preceding pages of this book have been devoted to sketching the historical evolution of one of those parts, down to our own day.

It is already a trite remark that among the many singular analogies between the legal history of Rome and that of England, a prominent place must be given to the resemblance which connects the ancient *jus gentium* with our recent Indian Codes. It is scarcely premature to conjecture that the next few years will carry the analogy still further. The *jus civile* was gradually assimilated to humbler rules which its scholars had originally fashioned, not for its courts, but for exportation to the tribunal of Rome's foreign subjects. In like manner the efforts of the next few years to reform English law will probably be shaped, as in the case of the Criminal Code of the present Government, upon the lines of a jurisprudence which Englishmen have fashioned for Indian use.

The present volume would thus be incomplete without some reference to the manner in which the framers of the Anglo-Indian Codes have dealt with the law of husband and wife; and as those Codes are not readily accessible to most English readers, I reproduce the Indian Married Women's Property Act at length. Its recitals and its enactments describe a jurisprudence in which the so-called partnership of man and wife has ceased to be a mere *societas leonina*, and the bride's rights are no longer left to depend on the chance of her having secured a settlement as the charter of her fireside.

THE MARRIED WOMEN'S PROPERTY ACT.

AN ACT to explain and amend the law relating to certain married women, and for other purposes.

Whereas it is expedient to make such provision as hereinafter appears for the enjoyment of wages and earnings by women married before the First day of January, 1866, and for insurances on lives by persons married before or after that day;

And whereas by the Indian Succession Act, 1865, section four, it is enacted that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried:

And whereas by force of the said Act all women to whose marriages it applies are absolute owners of all property vested in or acquired by them, and their husbands do not by their marriage acquire any interest in such property; but the said Act does not protect such husbands from liabilities on account of the debts of their wives contracted before marriage, and does not expressly provide for the enforcement of claims by or against such wives;

It is hereby enacted as follows:—

I.—PRELIMINARY.

1. This Act may be called "The Married Women's Property Act, 1874."

2. It extends to the whole of British India, and, so far as regards subjects of her Majesty, to the dominions of Princes and States in India in alliance with her Majesty.

But nothing herein contained applies to any married woman who at the time of her marriage professed the Hindú, Muhammadan, Buddhist, Sikh, or Jaina religion, or whose husband, at the time of such marriage, professed any of those religions.

And the Govenor General in Council may from time to time, by Order, either retrospectively from the passing of

this Act or prospectively, exempt from the operation of all or any of the provisions of this Act the members of any race, sect, or tribe, or part of a race, sect, or tribe, to whom he may consider it impossible or inexpedient to apply such provisions. The Governor General in Council may also revoke any such Order, but not so that the revocation shall have any retrospective effect. All Orders and revocations under this section shall be published in the *Gazette* of India.

The fourth section of the said Indian Succession Act shall not apply, and shall be deemed never to have applied, to any marriage one or both of the parties to which professed, at the time of the marriage, the Hindú, Muhammadan, or Buddhist, Sikh, or Jaina religion.

3. This Act shall come into force on the passing thereof.

II.—MARRIED WOMEN'S WAGES AND EARNINGS.

4. *Married women's earnings to be their separate property.*

The wages and earnings of any married woman acquired or gained by her after the passing of this Act, in any employment, occupation, or trade carried on by her and not by her husband, and also any money or other property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all savings from and investments of such wages, earnings, and property, shall be deemed to be her separate property, and her receipts alone shall be good discharges for such wages, earnings, and property. (Cf. the English Act, p. 72, *supra.*)

III.—INSURANCES BY WIVES AND HUSBANDS.

5. *Married woman may effect policy of insurance.*

Any married woman may effect a policy of insurance on her own behalf and independently of her husband; and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure as her separate property, and the contract evidenced by such policy shall be as valid as if made with an unmarried woman. (Cf. the English Act, p. 149, *supra.*)

6. *Insurance by husband for benefit of wife.*

A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate.

When the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee of the Presidency in which the office at which the insurance was effected is situate, and shall be received and held by him upon the trusts expressed in the policy, or such of them as are then existing.

And in reference to such sum he shall stand in the same position in all respects as if he had been duly appointed trustee thereof by a High Court, under Act No. XVII. of 1864 (to constitute an office of Official Trustee), section ten.

Nothing herein contained shall operate to destroy or impede the right of any creditor to be paid out of the proceeds of any policy of assurance which may have been effected with intent to defraud creditors. (These clauses also are based upon the English Act.)

IV.—LEGAL PROCEEDINGS BY AND AGAINST MARRIED WOMEN.

7. *Married women may take legal proceedings.*

A married woman may maintain a suit in her own name for the recovery of property of any description which, by force of the said Indian Succession Act, 1865, or of this Act, is her separate property; and she shall have, in her own name, the same remedies, both civil and criminal, against all persons, for the protection and security of such property, as if she were unmarried. (Cf. the English Act, p. 114, *supra*.)

8. *Wife's liability for postnuptial debts.*

If a married woman (whether married before or after the First day of January, 1866) possesses separate property, and if any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, such person shall be entitled to sue her, and, to the extent of her separate property, to recover against her whatever he might have recovered in such suit had she been unmarried at the date of the contract and continued unmarried at the execution of the decree:

Provided that nothing herein contained shall affect the liability of a husband for debts contracted by his wife's agency, express or implied, or render a married woman liable to arrest or to imprisonment in execution of a decree. (Cf. the English rules of equity, pp. 110—113 *supra.*)

V.—HUSBAND'S LIABILITY FOR WIFE'S DEBTS.

Husband not liable for wife's antenuptial debts.

A husband married after the Thirty-first day of December, 1865, shall not, by reason only of such marriage, be liable to the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and shall, to the extent of her separate property, be liable to satisfy such debts as if she had continued unmarried:

Provided that nothing contained in this section shall affect any suit instituted before the passing of this Act, nor invalidate any contract into which a husband may, before the passing of this Act, have entered in consideration of his wife's antenuptial debts. (Cf. the English Acts, pp. 95—96.)

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